No. 21121

IN THE

United States Court of Appeals For the Ninth Circuit

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

RYAN, ASKREN, CARLSON, BUSH & SWANSON
RICHARD J. HOWARD
RICHARD K. BUSH
Attorneys for Appellee

Office and Post Office Address:
545 Henry Building
Seattle, Washington 98101

METROPOLITAN PRESS SEATTLE, WASH.

INDEX

TABLE OF CASES

STATUTES

ANNOTATIONS AND TEXTBOOKS

IN THE

United States Court of Appeals For the Ninth Circuit

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

STATEMENT OF FACTS

The appellant's Statement of Facts is fairly accurate. However, appellant has stated certain questionable conclusions and there are certain additions which should be made. The organization used by the appellant will be followed and those areas where amplification is needed will be pointed out. The words Rayonier and appellant will be used interchangeably throughout.

A. Background

The Polson-Jackson Joint Venture.

The 1951 Joint Venture Agreement (Ex. 1) was recorded on June 3, 1953, in Volume 337 of Deeds at page 444, records of Grays Harbor County, State of Washington. (Tr. 618) The terms of the Joint Venture were amended and restated in an agreement dated November 5, 1957. (Ex. 2) Appellant has referrred to Jackson as the manager of the Joint Venture, and to some extent he was. However, as set forth in the 1951 Joint Venture Agreement (Ex. 1) and the Declaration relating to the Bumgarner Allotments (Ex. 3) the consent of Polson was required before any timber cutting contract or sale could be consummated. Further, outside of the contract in question here, Jackson did not enter into any sales of land or timber or timber cutting contracts on behalf of the joint venture. (Tr. 64-65, 494)

The Crane Creek Contract.

As a practical matter, the Crane Creek Contract effectively ties up the Indian interests on the reservation. Unless an Indian owner places his allotment under the Crane Creek Contract and then waits for Rayonier to log it, he has to wait until 1986 when the Crane Creek Contract expires before he can proceed to have his allotment logged by other parties. (Tr. 304)

Frank D. Beaulieu.

Mr. Beaulieu is an elderly man, at the time of the trial he was 83 years old. (Tr. 488) His practice of law, if any,

was very limited. His duties and responsibilities for the joint venture were largely, if not wholly, clerical and ministerial, and such as they were, his duties were primarily, if not exclusively, concerned with the acquisition of timber lands by the joint venture and not the sale of joint venture property. (F & C No. 5, Ex. B, R. 342-343, and see citations to the record set forth in the Appendix hereto in support of said finding)

Cleveland Jackson

Jackson received approximately $400 a month from Rayonier. The monthly accountings Jackson submitted set forth the number of days worked. However, no check was made as to whether he actually worked and it appears in many instances he did not, in fact, perform any work during a given month. (Tr. 241-245) Jackson, as chief of the Quinault Indian Tribe, was a valauable man to Rayonier. He knew all the Indians and was successful in getting rights-of-way. (Tr. 245-246) Since 1947, and particularly for the past five years, Rayonier has obtained about 30% of the timber needs for their Grays Harbor mill from the Quinault Indian Reservation. (Tr. 248)

Nina Bumgarner

Several of the statements made by appellant are conclusions with which we take exception. The assertions that the contracts were merely to accommodate Mrs. Bumgarner and that Rayonier had no axe to grind and no ulterior motives, are based on testimony of Rayonier's employee witnesses. Based on the record as a whole, there is a strong basis for inferring ulterior motives on the

part of Rayonier. These will be dealt with in the argument portion of this brief.

The price under the Crane Creek Contract was stipulated to by the parties as the value to be used in determining damages. However, appellee had contended the fair market value was higher and appellant had contended it was lower.

B. Acquisition of a One-Half Interest in the Bumgarner Allotments

The appellant's description of the restrictions in August 5, 1953 Declaration (Ex. 3) is inadequate. The Declaration is an acknowledgment by Jackson that he holds title to the undivided interests in the Bumgarner allotments

> ". . . as trustee under the terms of a certain agreement dated March 5, 1951, and is without power to sell, exchange, convey, mortgage or otherwise encumber the same or contract in respect thereto except in accordance with the terms of said agreement, an original counterpart of which has been deposited with Arnold Polson at Hoquiam, Washington, where upon authorization from Cleveland Jackson said agreement may be inspected by persons interested in said property."

Paragraph IV of the 1951 Joint Venture Agreement (Ex. 1) provides in pertinent part:

> "Sales or other dispositions of the tracts so acquired, or any of them, including contracts for the logging of the timber thereon, shall be made from time to time *as agreed upon by the parties hereto,* and all proceeds thereof as received shall be paid to Polson. . . ." (Emphasis supplied)

C. 1954 Memorandum of Intent

The registered letter sent by Polson to Rayonier (Ex. 6) is important and therefore the body of it is set forth below in its entirety.

> "I am advised that under date of April 19, 1954, you, through M. B. Houston, Assistant to your President, entered into an agreement with Cleveland Jackson relative to road use rights for access to certain lands in the Crane Creek cutting unit of the Quinault Indian Reservation. *I call to your attention that as to some, if not all, of the lands to which that agreement relates, Cleveland Jackson holds title as trustee only and is without power or authority to contract in respect thereto except in accordance with the terms of the agreement under which he is acting as trustee,* as is evidenced by various instruments duly recorded in the office of the Auditor of Grays Harbor County. *I further give notice that the purported agreement with you dated April 19, 1954, is unauthorized insofar as it relates to lands covered by said trust agreement.*
>
> "I am one of the beneficiaries of said trust agreement and will be available with Mr. Jackson to negotiate for such facilities as may be necessary and/or desirable for access to and the logging of the lands covered by said trust agreement." (Emphasis supplied)

The Bumgarner allotments were included in the April 19, 1954 letter agreement to which the above letter refers.

D. Negotiations With Bureau of Indian Affairs Prior to the Rayonier-Jackson Contract

Mr. Libby may have assumed Mr. Jackson had authority to speak for the Joint Venture, but there is no evidence that he was aware of any transactions consummated by Mr. Jackson. One additional fact is important. When

the Indian Agency first undertook to sell Mrs. Bumgarner's interest in the two allotments by public auction, Rayonier protested the sale. The letter of protest (Ex. 56) dated October 31, 1953 referred to the Crane Creek Contract and stated in pertinent part:

> "Rayonier Incorporated hereby protests and objects to the proposed sale of the above described tracts within the Crane Creek Logging Unit or the timber thereon unless and until the same is first offered to Rayonier under the above identified contract.
>
> "We regard the proposed sale as a violaton of the above quoted representations, which representations were of importance to us in our decision to enter into our contract."

E. Events Prior to the Rayonier-Jackson Contract

There are several areas here which should be expanded. At the time of the execution of the contracts between Rayonier and the Indian Service (on behalf of Nina Bumgarner), Mr. Libby did not contemplate Rayonier could log the allotments without first obtaining the consent of the owners of the other undivided interest. (Tr. 409-41) He had so advised Rayonier and felt it was their responsibility to obtain the necessary consent. (Tr. 404) Rayonier was aware of the necessity of such consent and did not consider it could log without appropriate consent. (Tr. 209-212)

Rayonier was fully aware that the undivided interest in the Bumgarner allotments was Polson-Jackson joint venture property. (R. 138) Despite the foregoing knowledge, Rayonier drafted the Rayonier-Jackson contract (Ex. 15) in which it was provided that:

"Whereas, Jackson represents and warrants to Rayonier that he is the owner of the remaining one-half interest in the timber on the above described property. . . ."

The Rayonier-Jackson contract also provided that payments were to be made to Jackson, even though Mr. Forrest had previously read the 1951 Joint Venture Agreement wherein it provided all proceeds were to be paid to Polson. (R. 137) Further, there is no reference in the Rayonier-Jackson contract to Polson or to the Polson-Jackson Joint Venture.

With respect to "negotiations" by Jackson during 1959 and 1960 with prospective purchases, Jackson reported he had prospects and he was to determine how interested they were. However, Polson made it clear he was to be present at any negotiations. (Tr. 67-74) They did not have any such negotiations.

F. Investigation By Polson of Joint Venture Properties

It should be noted that for quite a few months following the death of Cleveland Jackson, matters were very confused and uncertain. (Tr. 510) This was a period of checking out false leads, determining true facts, locating assets, etc. (Tr. 508) It is not fully clear just when various facts became fully known. It was the finding of the court that based on all the evidence, Polson did not acquire full knowledge of all material facts until July, 1961. (R. 335)

G. Logging By Rayonier on the Allotments

The logging by Rayonier was substantially completed by July 1, 1961. (R. 140) At the time that Rayonier made

payments to Anna Jackson, as executrix of the Estate of Cleveland Jackson, it had in its possession a copy of the 1951 Joint Venture Agreement which provided that proceeds from any sales or logging were to be paid to Polson. (Ex. 1, Tr. 299) Rayonier did not review the 1951 Joint Venture Agreement at the time it decided to make the payments to Anna Jackson. (Tr. 299)

H. Creditor's Claim and Demands Upon Jackson Estate

Appellant has used the words "standing demand." Mr. Bush in his deposition used the word demand. His testimony at the trial as to the specific facts disclosed that the actions were more in the nature of a request to preserve funds than a "legal demand." (Tr. 580-584) Mr. Kirkwood testified there was no "demand." (Tr. 517) In addition, the Creditor's Claim did not include a claim for the proceeds from the Bumgarner Allotments. (Tr. 582)

I. Suit By Polson Against Jackson Estate

It is the position of appellee that the suit against the Jackson Estate did not include any claim to the proceeds from the Bumgarner Allotments. (Tr. 583 and see Part II of the argument portion of this brief)

J. Settlement

The primary purpose of the escrow was to preserve the funds pending the outcome of this litigation. (Tr. 583) It was felt that if Mrs. Jackson obtained the funds she would dissipate them. (Tr. 581-582) Mr. Bush, attorney for Polson, suggested to Rayonier that they should tie up the funds, but they didn't do so. (Tr. 582)

Subsequent to the trial and the judgment of the trial court allowing Rayonier an offset for the amount of the escrow funds to extent they could be recovered, the funds were delivered to Polson under a stipulation that such delivery would not act to the prejudice of either of the parties to this action.

RESPONSE TO APPELLANT'S SPECIFICATIONS OF ERROR

Specification 1.1 Finding and Conclusion No. 4 (R. 335)

This finding deals with (1) when Polson became aware of the existence of the logging contract; (2) when he acquired full knowledge of material facts; (3) that it has not been established that either (a) Polson's failure to notify Rayonier was unreasonable in the circumstances or (b) that Polson's conduct actually misled or prejudiced Rayonier. The conclusion reached is that Rayonier failed to establish either its affirmative defense of ratification or estoppel.

It should be kept in mind that the burden of proof of the affirmative defenses rested on the appellant and the court found this burden was not sustained. In an appendix to this brief we have set forth citations to the record in support of the above finding. However, to large extent the determination rests on a failure on the part of appellant to sustain its burden of proof.

In its brief, on page 28, appellant has primarily referred to items of alleged prejudice to appellant. The rebuttal argument to appellant's statements is set forth in Part III of the argument portion of this brief under the heading "The silence must have actually misled and prejudiced appellant" (page 42 hereof). In fact the appel-

lant was not prejudiced by any lack of action by Polson after he acquired full knowledge of the material facts. Further, as set forth therein, a proper inference from the evidence is that the appellant did not, in fact, rely upon a lack of objection by Polson and was not misled. Rather, its actions were unlawful and unwarranted.

Specification 1.2.1 Finding and Conclusion No. 5 Ex. B (R. 340-1)

This deals with the court's conclusion that a preponderance of the evidence established the right of the plaintiff to recover treble damages unless precluded by one of the defendant's affirmative defenses.

Appellant on page 2 of its brief has stated that the finding is erroneous because (1) it ignores Jackson's "inherent authority" and (2) Rayonier, as a purchaser from Nina Bumgarner, could not be guilty of either statutory trespass or waste. The inherent authority question is covered in Part I of the argument portion of this brief and the status of Rayonier as a purchaser from Nina Bumgarner in Part IV. Particular citations to the record with respect to these two areas are set forth in the appendix hereto.

Specification 1.2.2 Finding and Conclusion No. 5. Ex. B (R. 341)

This finding sets forth the trial court's conclusion that the evidence actually preponderates against the defenses of estoppel, ratification, and apparent authority, but at a minimum it has to be found that there is not a preponderance of the evidence to sustain any of the affirmative defenses.

Appellant, on page 29, states this finding is erroneous because it (1) ignores Jackson's inherent authority; and (2) ignores the fact that as a matter of law Polson has either ratified the Jackson-Rayonier contract or is estopped to question its validity. The inherent authority question is considered in Part I of the argument portion of this brief; the ratification question in Part II; and the estoppel question in Part III. The finding and conclusion is correct. Some citation to the record supporting this finding has been set forth in the appendix hereto. However, to a large extent, this is a negative situation because it involves the failure of the appellant to sustain its burden of proof on affirmative defenses.

Specification 1.2.3. Finding and Conclusion No. 5. Ex. B (R. 342-3)

The finding deals with the duties and actions of Frank Beaulieu in connection with Joint Venture affairs. The finding is well supported by the evidence. Citations to the record are set forth in the appendix hereto. Appellant has primarily taken exception to the characterization of Beaulieu's duties as clerical and ministerial and to the statement that his duties were in connection with the acquisition of timberlands for the Joint Venture and not the sale of Joint Venture property. The finding is correct and is supported by the evidence. Beaulieu did not make decisions. He checked records, prepared documents, checked files and maintained files. (Tr. 343-345) All this was in connection with acquisitions. Beaulieu testified he did not know of any sales of Joint Venture property. (Tr. 493-494) In fact, there were none.

Specification 1.2.4 Finding and Conclusion No. 5. Ex. B (R. 343-4)

This finding states that under all the circumstances it was not Beaulieu's duty to report what little he knew of the matter to Polson.

Beaulieu was an employee. He naturally assumed Jackson would discuss the matter with Polson, since he knew both of them had to agree to any timber cutting contract. Jackson had all the facts. Therefore, Beaulieu properly felt it was not his responsibility to do anything further.

Specification 1.2.5. Finding and Conclusion No. 5. Ex. B (R. 344)

Here the court states its conclusion that the plaintiff is entitled to treble damages. This being a legal conclusion, there is no need for citations to the record. The facts applicable to the various legal questions are set forth in the argument portion of the brief.

Specification 1.2.6. Finding and Conclusion No. 5. Ex. C (R. 349)

The court allowed interest on the compensatory portion of the damages. This is strictly a legal question and is covered in Part VII of the argument portion of this brief.

Specification 1.2.7. Finding and Conclusion No. 5. Ex. C (R. 356)

The court ruled the recovery should be for the full amount and not reduced by reason of any interest of Jackson. The court held that the agreement clearly established Polson was to be fully reimbursed before Jackson was to have participated in any proceeds.

The argument on this is set in Part VI of this brief.

Citations to the record in support of the finding are set forth in the appendix. In light of the substantial embezzlement by Jackson, there will never be any proceeds in which Jackson will be entitled to participate. (Tr. 516-517) Polson will, in all probability, never be fully reimbursed. Appellant has continued to approach the matter on a parcel by parcel basis, which is clearly contrary to the provisions of the Joint Venture Agreement.

Specification 1.2.8. Finding and Conclusion No. 5. Ex. D (R. 361)

This is a legal conclusion that appellant was liable for treble damage trespass under R.C.W. 64.12.030 and in the alternative for treble damage waste under R.C.W. 64.12.020. The legal conclusion is correct. The argument on behalf of appellee is set forth in Part IV of the argument portion of this brief.

Specification 1.3. Finding and Conclusion No. 2. (R. 334-335)

Appellant has taken exception to this portion of finding which states that Mr. Libby (Indian Service) "did not have authority to authorize a contract without first obtaining the approval of Polson, which approval was not obtained." Citations to the portions of the record supporting this finding are set forth in the appendix. The argument with respect thereto is set forth in Part IV of the argument portion of this brief under the heading "The Bumgarner-Rayonier Contracts, or the Performance Thereof, Were Necessarily Conditional Upon Appellant Obtaining Polson's Consent." (Page 53)

In addition, the appellant, in Specifications of Error 2.1 through 5.1, has cited as error the refusal of the

court to make certain findings and conclusions favoring appellant. There are no citations to the record by the appellant. These are matters of argument covered in the briefs.

SUMMARY OF ARGUMENT

The facts clearly established Jackson did not have any authority, whether actual, apparent or inherent, to execute the Addendums or the Rayonier-Jackson Contract for the cutting of timber on the Bumgarner Allotments. The execution of the contract and the cutting and removal of timber was without Polson's knowledge or consent. Rayonier had more than adequate warning as to restrictions on Jackson's authority. Yet, Rayonier proceeded to deal with Jackson and to cut the timber after Jackson's death without once communicating with Polson. Such action was reckless and totally unjustifiable.

The Rayonier-Bumgarner contracts did not give Rayonier the right to proceed without first obtaining the requisite consent of the other co-owner of the allotments. This consent was not obtained. Rayonier cut and removed over 3 million board feet "without lawful authority" and by doing so subjected itself to the treble damage provisions of R.C.W. 64.12.030, or, in the alternative, R.C.W. 64.12.020.

Appellant Rayonier raised several affirmative defenses, principally apparent authority, ratification and estoppel. However, as to each the Court properly found appellant had failed to sustain its burden of proof. In fact, the Court felt the evidence preponderated against the affirmative defenses. The apparent authority issue was mentioned above. With respect to ratification, it was

clearly established Polson at no time intended to ratify the contract and in light of the existing circumstances his actions were reasonable and would not give rise to a forced ratification. As to estoppel, several important factors were established. Under the circumstances, Rayonier cannot be considered an innocent party in proceeding as it did despite the facts which would have acted as a warning to any reasonably prudent party. Polson's actions were reasonable in light of the existing circumstances, and would not give rise to estoppel. Further, Rayonier did not, in fact, rely upon any lack of objection from Polson, or if it did so, such reliance was clearly unjustified. Finally, Rayonier, after July, 1961, the point in time when Polson finally acquired reasonably full knowledge of the material facts, was not prejudiced by any action or lack of action on the part of Polson. Substantially all of the logging was completed by July 1, 1961. The subsequent payment by Rayonier to Anna Jackson was contrary to the 1951 Joint Venture Agreement, of which Rayonier had a copy, and such action by Rayonier was unwarranted and disregarded the rights of Polson. Throughout, Rayonier studiously avoided contacting Polson despite his clear rights therein. In any event, the funds paid to Anna Jackson were preserved through the efforts of Polson's attorney and Rayonier was allowed an offset.

The trial court after carefully reviewing the evidence and legal arguments correctly determined the appellant to be liable for treble damages under R.C.W. 64.12.030, or, in the alternative, under R.C.W. 64.12.020.

PART I

Jackson Did Not Have Apparent Or Inherent Authority to Execute the Rayonier-Jackson Contract and the Addendums

Part I of the Argument portion of appellant's brief is devoted to the issue of Inherent Authority, which is much the same as the better-known doctrine of apparent authority. The evidence clearly established no apparent or inherent authority in fact existed.

The principal can always limit the authority of his agent (or partner) and if the limitation is known to the third party, the power to bind the principal is so limited. Further, a person dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent (or partner) is acting within the scope of his authority. If the third person knows, or should know, of the limitations placed on the agent's authority and that the agent is exceeding it, the principal cannot be bound. A good summary of the duty of a third person to ascertain the extent of an agent's authority is set forth in 3 Am. Jur. 2nd, *Agency*, Section 78, on pages 482-483, as follows:

> "A third person dealing with a known agent may not act negligently with regard to the extent of the agent's authority or blindly trust the agent's statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers. The mere opinion of an agent as to the extent of his powers, or his mere assumption of authority without foundation, will not bind the principal; and a third person dealing with a known agent must bear the burden of determining for himself, by exercise of reasonable diligence and prudence, the existence or nonexistence of the agent's authority, to act in the premises. The principal, on

> the other hand, may act on the presumption that third persons dealing with his agent will not be negligent in failing to ascertain the extent of his authority as well as the existence of his agency."

See also:

Pacific Savings & Loan Assn v. Corbett, 155 Wash. 45, 283 Pac. 479 (1929).

Brace v. Northern Pac. Ry. Co., 63 Wash. 417, 115 Pac. 841 (1911).

O'Daniel v. Streeby, 77 Wash. 414, 137 Pac. 1025 (1914).

Woodworth v. School Dist. No. 2, Stevens County, 92 Wash. 456, 159 Pac. 727 (1916).

Olsson v. Hansen, 50 Wn.2d 199, 310 P.2d 251 (1957).

As stated in *Lamb v. General Associates, Inc.,* 60 Wn.2d 623, 627, 374 P.2d 677 at page 680 (1962):

> "The burden of establishing agency rests upon the one who asserts it. Facts and circumstances are sufficient to establish apparent authority only when a person *exercising ordinary prudence,* acting in good faith and conversant with business practices and customs, would be misled thereby, *and such person has given due regard to such other circumstances as would cause a person of ordinary prudence to make further inquiry.*" (Emphasis supplied)

Rayonier had knowledge of, or certainly should have known of, the limitations on Jackson's authority. Rayonier, as shown below, had sufficient knowledge to give rise to a duty to inquire as to the exact nature of Jackson's authority.

1. The 1951 Joint Venture Agreement provided that

sales could be made as agreed upon by both Jackson and Polson, and the proceeds were to be paid to Polson. (Ex. 1) The agreement or consent of both parties was essential.

2. Rayonier obtained a certified copy of the 1951 Joint Venture Agreement in June of 1954 (R. 136), and Forrest read said agreement prior to July 2, 1959, when the Addendums were signed by Jackson. (R. 137) Further, said agreement had been recorded. (R. 133)

3. The Declaration (Ex. 3) recited that Jackson was holding title as trustee only and was without authority to sell, convey, or otherwise contract with respect thereto, except in accordance with the terms of the 1951 Joint Venture Agreement. The Declaration was recorded in May of 1954. (Tr. 618)

4. In April of 1954, Rayonier and Jackson entered into a letter agreement (Ex. 5) with respect to rights of way over certain lands, including the Bumgarner lands. (R. 136)

5. Polson advised Rayonier by registered letter in June of 1954 that Jackson held title as trustee only, he did not have authority to execute the agreement (Ex. 5), and said agreement was unauthorized. See page 5 hereof for the full wording of the letter.

6. Rayonier knew Jackson's ownership in the Bumgarner Allotments was subject to the terms and conditions of the agreement between Jackson and Polson. (R. 138)

Clearly, the above items were enough to place Rayonier on notice that there were limitations on the extent of Jackson's authority. It became incumbent on Rayonier to in-

quire as to the extent of his actual authority in a given situation. When Rayonier failed to do so, it acted at its peril. A single telephone call to Polson would have avoided this entire lawsuit, and Forrest knew full well where to contact Polson. (R. 136) This is particularly true where a sale of a joint venture asset was involved. The tendency of the courts has been to not extend authority by implication to include such an extraordinary and unusual power. See 3 Am. Jur. 2nd *Agency*, Section 117, page 514.

The appellant has tried to minimize the effect or importance of Item 5 above; the letter from Polson to Rayonier on June 1, 1954 advising Rayonier that Jackson held title as trustee only, that he did not have authority to execute any such contracts, and said agreement was unauthorized. However, despite the arguments of appellant, this letter would have acted as a strong warning to any reasonable party. The questioning of Mr. Forrest in connection with the interpretation properly to be placed on the June 1, 1954 letter is pertinent:

> "THE COURT: Now, I also understand that it was you who was in charge of the negotiations or the inquiries leading into the letter, Exhibit 5—
>
> "THE WITNESS: Yes.
>
> "THE COURT: Operating, of course, as a subordinate to Mr. Houston, is that right?
>
> "THE WITNESS: That is right.
>
> "THE COURT: You were thoroughly familiar with the proposed right-of-way and the problems incident to that that are referred to in this Exhibit 5, the proposed letter agreement?
>
> "THE WITNESS: Yes.
>
> "THE COURT: Now, in connection with that, this

letter of Mr. Polson's, Exhibit 6, that came to your attention at that time?

"THE WITNESS: No, your Honor, I never saw this letter until my deposition was taken. This went to the Seattle office. My office is in Hoquiam.

"THE COURT: Your attention was called to the fact that Polson had made an objection?

"THE WITNESS: Yes.

"THE COURT: You did know that Polson had objected to the transaction referred to in Exhibit 5?

"THE WITNESS: That is right.

"THE COURT: Now, the transaction in Exhibit 5 related merely to a right-of-way across a corner of allotment property?

"THE WITNESS: Yes.

"THE COURT: Knowing that Polson had taken objection by written document to Jackson negotiating merely a right-of-way, did this not bring to your mind the fact that Polson might very well have some kind of objection to contracts relating to the cutting of timber?

"THE WITNESS: No, under the circumstances, it didn't.

"THE COURT: What do you mean, under the circumstances?

"THE WITNESS: This objection to this letter, your Honor, was because it was a blanket situation.

"THE COURT: Read what Polson says it was, he doesn't talk about any blanket business, he talks specifically about his letter of Jackson being a trustee only without authority to negotiate or contract for the sale or cutting or whatever doesn't he? Could it be any plainer, that letter, to you, now that you do read it?

"THE WITNESS: No, it is plain.

"THE COURT: I mean it is specific and categori-

cal, isn't it, that Polson states in his letter that 'Jackson holds title as trustee only and is without power or authority to contract in respect thereto excepting in accordance with the terms of the agreement, as evidenced—', and so forth, by the document filed?

"THE WITNESS: Yes.

"THE COURT: Right?

"THE WITNESS: Yes, it says that.

"THE COURT: Now, with the knowledge that the right-of-way transaction was abandoned because of Polson's objections, how do you explain that she [sic —you] never at any time took any occasion to call Mr. Polson's attention to the proposed contract, Exhibit 15, for the cutting of timber on the Bumgarner allotments?

"THE WITNESS: I assumed that Mr. Jackson was a manager of the joint venture and that he had the right to negotiate.

"THE COURT: Well, of course, if you read Exhibit 6, you would know that was—Polson was contending otherwise, wouldn't you?

"THE WITNESS: Exhibit 6.

"THE COURT: Read it now."

". . . .

"THE WITNESS: I have read it.

"THE COURT: Now, having read it, is there the slightest doubt in your mind that Polson was contending that Jackson was without authority to enter into a cutting contract, such as Exhibit 15?

"THE WITNESS: I would still think, your Honor, that Mr. Jackson had the right of management of the trust property.

"THE COURT: That isn't what I asked you; I asked you, is there the slightest doubt in your mind that Polson was contending that Jackson was without authority to enter into a contract such as Exhibit 15?

"THE WITNESS: On the face of it, I would say that is a correct statement.

"THE COURT: There isn't any other interpretation possible of it, is there?

"THE WITNESS: Not under those—not under that light.

"THE COURT: And you say you never saw this letter?

"THE WITNESS: No, I didn't see that letter.

"THE COURT: But somebody in Rayonier saw it.

"THE WITNESS: Yes.

"THE COURT: It must have been Mr. Houston or someone in his department? Is that right?

"THE WITNESS: That is right, it was.

"THE COURT: And that person, whoever it was, should have taken the same inference from this letter that you now take, shouldn't he?

"THE WITNESS: Perhaps so."

(Tr. 304-309)

Mr. Houston did communicate with Mr. Forrest concerning the objection by Polson:

"A. Shortly after that, Mr. Houston called me and told me that he had received a letter from Mr. Polson that was a sharp letter, and to forget this whole thing." (Tr. 601, ll. 7-9)

The balance of appellant's arguments can be covered briefly. Primarily the arguments state conclusions and overlook many basic facts established by the testimony.

1. Appellant's argument: "The business of the Joint Venture included the logging or contracting for the logging of timber."

Indeed, this was one of the stated purposes of the 1951 Joint Venture Agreement. (Ex. 1) However, this agree-

ment, which had been read by L. J. Forrest, also provided that any such action would be by joint consent of both Polson and Jackson. Certainly, then a prudent businessman would require both their signatures to a timber cutting contract. Not so with Rayonier; they drafted a contract (Ex. 15) in which Jackson warranted title and in which there was no mention of Polson or the Polson-Jackson Joint Venture. The facts also established that the only logging contracts in which the Joint Venture was involved were situations where the Joint Venture acquired property *subject to* a timber cutting contract. There were no instances of timber cutting contracts entered into after the acquisition of the property. (Tr. 64-65, 493-494)

2. Appellant's statement: "Jackson was the manager of the partnership and its affairs were handled entirely by him."

To some degree, Jackson did manage the affairs of the partnership. However, this cannot give appellant any real solace. Jackson was active in *acquiring* property not in selling. There were no sales. Polson did allow Jackson to investigate prospective purchasers to determine their degree of interest, but he was not to talk prices, etc. (Tr. 74-75) These were for a possible large sale, not a sale of the timber on only one or two allotments. Further, it was with the clear understanding that Polson was to be present at any negotiations. No such negotiation materialized. (Tr. 74)

3. Appellant's statement: "Jackson was carrying on the partnership business in the usual way."

This statement is completely untenable. As stated previously, there were no other sales or timber cutting con-

tracts entered into by the Joint Venture. (Tr. 493-494) The Jackson-Rayonier contract was unique. Such a timber cutting contract was not usual to the operation of this Joint Venture as it, in fact, operated. Further, when one considers the warning Polson had previously given Rayonier concerning the limitation of Jackson's authority (Ex. 5) and the knowledge Rayonier had as to the existence of the Joint Venture and its ownership of the undivided interest (R. 136-138), it is highly *unusual* that Rayonier would draft a contract (Ex. 15) wherein there was no mention of Polson or the Polson-Jackson Joint Venture, wherein Jackson and his wife were the signators and Jackson warranted title. If this contract was considered by Rayonier to be a natural or usual item of business for the Joint Venture, why was there no mention of Polson or of the Polson-Jackson Joint Venture? Why did they have Jackson falsely warrant title?

4. Appellant's statement: "Rayonier and the Bureau of Indian Affairs had no knowledge of restriction, if any, on Jackson's authority."

This statement is also completely untenable. Rayonier's chief officer in this area had read the 1951 Joint Venture Agreement. (R. 137) The Declaration (Ex. 3) wherein Jackson acknowledged that he was holding title as trustee and was without power to sell etc., except in accordance with the terms of the agreement had been recorded. (R. 135) In 1954, Rayonier entered into a right-of-way agreement with Jackson (Ex. 5), and Polson advised Rayonier by registered letter (Ex. 6) that Jackson did not have the authority to do so, and stated limitations on Jackson's authority. Clearly, Rayonier had knowledge of the existence of restrictions on Jackson's authority. At the

very least, Rayonier had sufficient knowledge to give rise to a duty to inquire. The duty, to determine the extent of Jackson's authority, fell on Rayonier, not the Indian Service, since the responsibility for obtaining the proper consent to the cutting was Rayonier's.

5. Appellant's statement: "The Joint Venture is bound by Jackson's representations concerning Polson's knowledge and approval.

The appellant cannot create authority merely out of the representations of Jackson. There must be independent evidence.[1] There were no other sales or timber cutting contracts on which Rayonier could rely as establishing a course of conduct. In light of the previous warning to Rayonier concerning the limitations on Jackson's authority, Rayonier could not reasonably rely on any statements by Jackson to the contrary. This is the basis on which Forrest stated he decided not to contact Polson. (Tr. 280, 285). Such a decision was clearly unwarranted. There was no evidence to indicate Polson had any knowledge of any such representations by Jackson. Actually, it is clear he was unaware of them. Further, it should be noted Jackson was working for Rayonier. (Tr. 238-248) Rayonier has not denied the regular monthly payments to Jackson, but rather has insisted Jackson was an independent contractor as distinguished from an employee.

Under all the circumstances Rayonier could not justifiably rely on any statements by Jackson as to authority, but rather had a duty to inquire as to the actual extent of his authority. Rayonier had a duty to contact Polson.

1. See *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 374 P.2d 677, 680, wherein the court stated:

> "It is also the well-established rule that the apparent or ostensible authority of an agent can be inferred only from acts and conduct of the principal. (Citations) The extent of an agent's authority cannot be established by his own acts and declarations."

6. Appellant's statement: "The execution of the Rayonier-Jackson contract and the Addendums was within the authority conferred on Jackson as managing partner."

Clearly, it was not. The 1951 Joint Venture Agreement specially provided that any such action would be by agreement of both Polson and Jackson. There was no course of conduct to the contrary. The Rayonier-Jackson contract was the first timber cutting contract. On pages 43 and 44 appellant has cited Sections 50 and 73 of the *Restatement of Agency*, 2d. Both sections start with the words "Unless otherwise agreed." The 1951 Joint Venture Agreement did provide to the contrary and Rayonier was well aware of its terms.

PART II

Polson Did Not in Any Manner Ratify the Rayonier-Jackson Contract and the Addendums

A. Purported ratification by silence.

Appellant has contended Polson remained silent and by such silence must be deemed to have ratified the Rayonier-Jackson contract.

Basically, the rule that ratification *can* be inferred from silence is designed to protect innocent parties. In light of its conduct, appellant Rayonier cannot be regarded as an innocent party. Mr. Forrest and Mr. Vincent testified that despite the following facts, they proceeded to deal with Jackson without once contacting Mr. Polson:

1. Mr. Forrest had read the 1951 Joint Venture Agreement (Ex. 1) and Rayonier had a copy of it in its files. (Tr. 228, 299) This agreement provided that sales could

be made as agreed upon by both Jackson and Polson, and the proceeds were to be paid to Polson.

2. The Declaration (Ex. 3) recited Jackson was holding as trustee only and was without authority to sell, convey or otherwise contract with respect thereto, except in accordance with the terms of the 1951 Joint Venture Agreement. The Declaration was recorded for public record on May 5, 1954 in the Grays Harbor County Auditor's Office. (R. 135)

3. In April of 1954, Rayonier and Jackson entered into a letter agreement with respect to rights of way over certain lands, including the Bumgarner Allotments. (Ex. 5) The information was furnished by Jackson and the agreement was prepared by Forrest. (Tr. 266)

4. By a registered letter dated June 1, 1954 (Ex. 6), Polson specifically advised appellant Rayonier that (a) Jackson held title as trustee only, (b) Jackson was without authority to individually sell, exchange, contract or otherwise dispose of the property, and (c) the above right-of-way agreement was unauthorized. This was a strong warning to appellant which should have raised red flags as to any dealings with Jackson without contacting Polson. Mr. Forrest was aware of the problems which arose and it was at this time that Rayonier obtained a certified copy of the 1951 Joint Venture Agreement. (Tr. 305)

5. Appellant Rayonier (Forrest and Vincent) knew Jackson's ownership in the Bumgarner Allotments was subject to the terms of the 1951 Joint Venture Agreement. (R. 137-138) In fact, they discussed this point at the time the Rayonier-Jackson contract was prepared. (Tr. 218-221)

6. In 1956 appellant prepared a large map showing all the Polson holdings in the Grays Harbor area and it showed the interest in the Bumgarner Allotments as a Polson-Jackson Joint Venture holding. (Ex. 27)

Appellant Rayonier, and in particular Mr. Forrest, who dealt with Jackson, knew full well of Polson's interest in the subject property and the limitations on Jackson's authority. Yet despite all the above, appellant did proceed to deal with Jackson and did not communicate with Polson at any time. Appellant even went further. Appellant drafted the Rayonier-Jackson agreement, in which Jackson warranted full title when appellant knew this was not true, and which provided for payments to Jackson when appellant had read the 1951 Joint Venture Agreement which provided that all payments were to go to Polson. It is difficult to imagine how appellant could have done so in "good faith," and certainly appellant does not fit in the category of an "innocent party." Perhaps the answer can be found in the fact appellant kept Jackson on its "payroll" because he was an extremely valuable man to them by reason of his relationship to the other Indians as Chief of the Quinault Indian Tribe.

It is important to remember silence does not automatically mean there is a ratification. Section 94 of the *Restatement of Agency* 2d, states:

> "An affirmance of an unauthorized transaction *can* be inferred from a failure to repudiate it." (Emphasis supplied)

The Restatement does not say ratification *must* be inferred. This distinction is pointed up on page 68 of

Seavey, *Law of Agency* (1 Vol. Edition) (1964) as follows:

> "The failure to disaffirm is of course explainable and with conflicting evidence the issue is for the jury, but if the inference is clear, the court can properly find *or not find*, ratification." (Emphasis supplied)

The trial court herein was the trier of fact and after carefully reviewing all the evidence, it determined Polson acted reasonably and ratification should not be inferred. To some extent this was a negative finding by the court in that it held appellant had not established by a preponderance of the evidence that Polson acted unreasonably under the existing circumstances.

The commentary in Seavey, *Law of Agency* continues on page 68 as follows:

> "The period during which the inaction lasted, the difficulty of communicating dissent, the loss which might result from failure to act promptly, as well as the habit and station in life of the purported principal are all relevant, *since ratification depends upon consent in fact* and not upon whether a reasonable person would give consent. *It should be noted also that as to a disobedient agent, who is conscious that he is acting contrary to the principal's desires, there is no moral duty to affirm, as there may be with a faithful but overzealous agent, and affirmance should be found only by conduct clearly indicating it.*" (Emphasis supplied)

There can hardly be any question as to the role of Jackson as a disobedient agent. His actions were clearly contrary to both the 1951 and 1957 Joint Venture Agreements and he embezzled in excess of $200,000 from Polson. (Tr. 525) Here Jackson was executing a contract, drafted by appellant, in which he falsely warranted

full title, and both Jackson and appellants knew this was false. (Tr. 218-219) It is clear Jackson intended, by executing the contract, to receive the proceeds personally, contrary to the joint venture agreement (Ex. 1) which provided that all proceeds were to be paid to Polson. Further the appellant participated in or at least furthered this deception. The appellant drafted the contract which provided for payment to Jackson, even though Mr. Forrest had knowledge of the Joint Venture Agreement, and its terms. A copy of the Joint Venture Agreement was in appellant's possession at the time the Rayonier-Jackson contract was prepared. (R. 136, Tr. 299) But Rayonier did not even bother to refer to it. (Tr. 219-220)

Although the case of *Myers v. Cook,* 87 W. Va. 265, 104 S.E. 593 (1920), is perhaps in the minority insofar as it uses the term "duty to speak" it is still a well reasoned case and the opinion is applicable here on the question of whether ratification should be inferred in light of the duty on the part of Rayonier to inquire before it acted. In *Mechem Outlines Agency,* Fourth Edition, page 145, the case is well summarized as follows:

> "One of the best known and best reasoned cases so holding is *Myers v. Cook.* There it appeared that husband and wife lived apart. He bought logging equipment and gave a promissory note for the price, signing her name as surety. This was done without her knowledge or authority. The husband had never done it before or acted as her agent in any way. When she heard the facts, she "grumbled" to some extent but gave no notice to the payee of the note. The court set aside a judgment against the wife, saying: 'The husband acted for himself in the transaction, not the wife. He acted against her in signing her name to a note for his debt. The plaintiff was as well aware of that fact as he was. *The former acted*

at his peril in taking the note without knowledge as to whether the husband had authority to bind his wife. He was bound to inquire and could not rely upon the supposed agent's representations. Rosendorf v. Poling, 48 W. Va. 621; *Rhorbough v. Express Co.,* 50 W. Va. 155. *The plaintiff omitted this duty,* and, presumptively, wronged the wife by his acceptance of the note with her name on it. *He could have ascertained by inquiry whether her signature was authorized, in time to save himself all she could have saved him by his disavowal. In other words, he could have done for himself what he thinks she should have done for him. To permit him to make her mere failure to do that prove ratification would allow him the benefit of his own wrong' . . .*" (Emphasis supplied)

In any event, the foregoing, together with other facts established by the evidence, fully support the determination of the trial court, as the trier of fact, that ratification should not be inferred in this instance.

The appellant has cited several Washington cases as supporting the general rule concerning ratification by silence, but, as shown below, a look at the facts shows each case is clearly distinguishable from this one.

Ankeny v. Young Bros., 52 Wash. 235, 700 Pac. 736 (1909).

This case turned on *conduct* on the part of the principal which evidenced ratification.

Lemcke v. Funk & Company, 78 Wash. 460, 139 Pac. 234 (1914).

This case involved a situation where the principal received benefits from the transaction.

Northwestern Lumber Company v. Cornell, 99 Wash. 250, 169 Pac. 590 (1917).

The third party advised the principal of its understanding of the agreement, and instead of repudiating it, the principal corresponded with the third party and stated he was using every effort to have a certain company take care of it.

Baker v. Seattle & Puget Sound Packing Co., 95 Wash. 45, 163 Pac. 17 (1917).

Basically, the same situation existed as in the *Northwestern* case above. The third party specifically contacted the principal who then remained silent for a long period of time instead of repudiating the agreement. In this case, appellant Rayonier studiously avoided any contact with Polson, when under the facts they certainly should have contacted him. If Rayonier had contacted Polson, and at that point he did not voice any dissent or objection, a far different situation would have existed.

Waldron v. Beattie Mfg. Co., 113 Wash. 533, 194 Pac. 557 (1920):

In this case the principal knowingly held the agent out as having authority and then upon receipt of the order, instead of rejecting it, gave as an excuse for not shipping it that he did not have the goods in stock at the time. This was clearly conduct inconsistent with the non-existence of affirmance.

Tobias v. Towle, 179 Wash. 101, 35 P.2d 1114, 41 P.2d 1119 (1934).

Here the principal knowingly placed the agent in a position of apparent authority and then over a long period of time accepted the benefits of the lease. Neither factor exists in this lawsuit.

B. Purported Ratification by Conduct

Appellant has also contended that Polson, by certain conduct, ratified the Rayonier-Jackson contract. An examination of the facts makes it clear Polson never intended to ratify the conduct and certainly should not be deemed to have done so.

1. Appellant contends Polson ratified by filing his creditor's claim in the Jackson Estate. The fundamental point here is this involves an affirmative defense, and appellant did not sustain its burden of proof. Mr. Bush, the attorney for appellee Polson and the "author" of the Creditor's Claim, stated that the proceeds from the Bumgarner Allotments were not included in the creditor's claim. (Tr. 582-583) Appellant did not pursue this statement any further and it remains as the only clear answer in the record.

Appellant has cited certain testimony by Mr. Polson as establishing that the proceeds were involved. However, appellant failed to quote or cite the following answers by Mr. Polson when appellant's attorney tried repeating the question as to whether the proceeds were included in the creditor's claim:

> "I have no way of knowing because I didn't know what the legal status of those things were, of the payments. I was relying on the attorney for, an attorney for advice." (Tr. 127, ll. 20-23)
>
> "I can't answer it yes or no." (Tr. 129, l. 3)

Therefore, there is no necessity to consider the legal question of whether the creditor's claim would constitute a ratification. The appellant did not sustain its burden of proof. The court accepted the statement of Mr.

Bush. Indeed, there was no evidence to the contrary.

2. Appellant contends that the "continuing demand" on the Jackson Estate for payment of the proceeds constituted a ratification of the Rayonier-Jackson contract. In this connection, appellant set forth in its brief certain portions of Mr. Bush's testimony in a deposition as supporting the argument that there was a demand. It is true the word "demand" was used therein. However, the appellant has omitted the testimony of Mr. Bush when the court delved deeply into the matter of "demand" to determine the actual "facts":

> "THE COURT: As I understand it, to clarify it, the only request or demand that you have referred to thus far as having been made, was oral and expressed in discussions with Mr. Kirkwood as attorney for the Jackson Estate or attorney for the executrix, Anna Jackson, of that estate, and this was in some of your discussions in the period you have indicated either by telephone or at his office? Is that substantially what you said thus far?
>
> "THE WITNESS: Yes, your Honor. I would say only one—I would only add one thing: I did use the characterization in my deposition 'demand' of what happened.
>
> "I don't think really what happened was a 'demand., I think what we are interested in is what was done.
>
> "THE COURT: The point is, to avoid that very problem, I noticed that very thing, but to avoid that problem, you may have noticed that I referred to either 'request' or 'demand' or what you said.
>
> "Let us put it this way: What did you say to Kirkwood concerning this, and was there any basis for your statement to Kirkwood expressed to him or anyone else?
>
> "THE WITNESS: There were a number of conver-

sations with Mr. Kirkwood.

"He, I think, indicated to me in all of those conversations that he didn't feel that this money belonged to the estate of Cleveland Jackson. He couldn't understand why what was done was done, but he didn't believe it belonged to the estate of Cleveland Jackson. However, there were other parties than Mr. Kirkwood involved in this than Mrs. Jackson.

"There was the National Bank of Commerce, which was the Guardian for three minor children, and there was also another party who was represented by an independent attorney, and those parties did not see eye to eye with Mr. Kirkwood as far as all and everything was concerned.

"I did want to know that Mrs. Jackson was not going to squander that money. Mr. Kirkwood told me somewhere along the way that he would put the money in a separate account, and he would hold the bank account, and I am sure that that was done.

"Sometime later in this picture, Mrs. Jackson became—she wanted money, and she did indicate to me that as far as she was concerned, that was her money, and she was going to take it, and I became very much concerned at that point.

"This, however, occurred after this lawsuit was commenced, and I informed Mr. Marion of this, and told him I thought Rayonier ought to do something to control that money because it was apt to be gone when we got to the time of a resolution of this lawsuit, and Mr. Marion, of course, said, 'well, that is your problem; why don't you get it.' And I said 'I am not going to do it.'

". . .

"(Continuing) We, of course, knew what this problem was, and we did everything we could to, number one, conserve these moneys, because we knew that if we prevailed in this lawsuit, Rayonier was going to want to recover those moneys. But we

weren't going to say they should be paid to Rayonier because we didn't have any right to control them, we felt, other than to conserve them, and that is what we did.

"Now, those moneys, as in evidence in this case, are tied up.

"THE COURT: The point is, did you at any time express any view other than you now have stated, to Kirkwood in your various discussion with him concerning these funds?

"THE WITNESS: No, my only statement was, 'We want these things' "——" 'We don't want them dissipated, we want them tied up some way so after this lawsuit is disposed of, those funds can be disposed of.'

"THE COURT: Did you ever at any time say to Kirkwood in substance or effect that you were demanding that those funds be paid over to Polson?

"THE WITNESS: No."

(Tr. 580, l. 2, to 584, l. 2)

The above testimony was confirmed by Mr. Kirkwood.

"Q. (By Mr. Beighle) Did you offer to transfer the funds to Mr. Polson?

"A. Do you mean after we put it in a special account?

"Q. Yes.

"A. No.

"Q. Did they ask you for it?

"A. No."

(Tr. 517, ll. 18-24)

The appellant did not sustain its burden of proving facts to the contrary. The above testimony clearly establishes the conduct of the parties was such that there was no "demand" in the legal sense which would constitute

a ratification of the Rayonier-Jackson contract. Further, it is clear from the evidence that at no time was there any intention to ratify said contract.

3. Appellant contends Polson ratified the Rayonier-Jackson contract by filing a lawsuit against the Jackson Estate. However, appellant has again mistakenly concluded that the action included a claim for the contract proceeds. The suit against Anna Jackson, individually and as executrix, which was commenced after this action, did not include any claim for the proceeds from the logging of the Bumgarner Allotments. (Tr. 582-583)

The complaint, including the accountings attached, were drawn so the contract proceedings were not included. Paragraph 1 of the prayer for relief referred to the real property of the Joint Venture not the proceeds in question. Paragraph 2 of the prayer was the claim for moneys and was based on the accounting attached thereto as an exhibit. The references to the proceeds in the complaint were merely to establish the proper background for the court. The important fact is they were not included in the prayer for relief. The only clear statement on this point in the record was by Mr. Bush, the "author" of the complaint and the accounting. (Tr. 582-583) The appellants did not pursue it further and certainly did not establish or sustain their burden of proof on an affirmative defense that the proceeds were included in the suit.

Therefore, there is no necessity to consider any legal questions concerning whether such a lawsuit would constitute a ratification. The appellant has proceeded on mistaken interpretation of the documents and has not sustained its burden of proof on the facts. Clearly the court

adopted the interpretation advanced by appellee.

4. Appellant has contended the settlement of the lawsuit (Ex. A-20-B), and the escrow agreement (Ex. A-20-A), constitute an exercise of control over the funds thereby giving rise to ratification. This contention is unfounded.

The settlement agreement entered into between F. Arnold Polson and Anna A. Jackson in June, 1963 does not, in any way, affect any claim or cause of action which Polson now has or has at any time had against any other party, including appellant.

In the agreement with Anna A. Jackson, the only consideration given by Polson was a covenant not to sue. As specifically provided therein, the agreement was not intended as a release or discharge of, nor an accord and satisfaction with, any person whomsoever. It was further specifically provided the agreement could not be placed in defense of an action which is a breach of the covenant not to sue, and that the only remedy for such a breach would be an action for damages.

In *Hawber v. Raley,* 92 Cal. App. 701, 268 Pac. 943, 944 (1928), cited with approval in *Rust v. Schlaitzer,* 175 Wash. 331, 27 P.2d 571 (1933), the court stated:

> "It would therefore appear to be a rule of construction that where two or more tort-feasors are involved and the document is such that the covenants may plead the same in abatement of any action which the covenantor might subsequently commence in breach of the obligation contained in said document and *the remedy thereunder is not restricted to an action on the covenant,* the document constitutes a release and satisfaction, and not a mere covenant not to sue." (Emphasis added)

Implicit in this statement is the doctrine that if an action on the covenant is the only remedy, the agreement is a mere covenant not to sue. The Washington court is committed to this doctrine. See *Haney v. Cheatham*, 8 Wn.2d 310, 111 P.2d 1003 (1941). As stated by the Washington Supreme Court in *Rust v. Schlaitzer*, 175 Wash. 331, 336, 27 P.2d 571 at page 573 (1933):

> "The distinction, in legal effect and consequences, between a covenant not to sue and a release is clear enough, but it is often difficult, in cases of tort, to determine whether an agreement falls within one category or the other. In classifying such an agreement, we may, so far as it effects joint tort-feasors, look to its consideration, its effect and the circumstances attending its execution."

In the agreement between Polson and Anna A. Jackson, the consideration given in return for the covenant not to sue was the putting in escrow of monies paid by Rayonier for timber in question in this lawsuit. The escrow agreement provides that if the finding in the present action is that Polson is bound by the contract made betwen Jackson and Rayonier, the money is to be turned over to Polson. If such is found to be the case, Polson would be legally entitled to such funds as they would be partnership monies by reason of the judicial determination. The agreement, therefore, merely protects Polson's position as to the funds in case it is herein determined he is entitled to them and must therby accept the Rayonier-Jackson contract. Under these circumstances, it could not reasonably be said that the putting of the funds in escrow was agreed or accepted as payment for any alleged tort. If Rayonier is found to have committed a tort, Polson would

not receive any funds from the escrow.[1] It is thus clear that in its language, intent, and legal effect the agreement is not a release for any tort claim nor an exercise of dominion by Polson. The sole purpose of the escrow agreement was to preserve the funds pending the outcome of this lawsuit. Where an agreement merely provides for a covenant not to sue one joint tort-feasor, there is no release of either joint tort-feasor. See *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959); *Pellett v. Sonotone Corp.*, 26 Cal.2d 705, 160 P.2d 783 (1945). The agreement between Polson and Anna A. Jackson did not release Rayonier.

Further it should be noted all this took place after the commencement of this lawsuit, whereby Polson had already clearly elected to repudiate the Rayonier-Jackson agreement, and his subsequent actions to preserve the funds were obviously not a ratification of said contract.

PART III

Polson Is Not Estopped to Deny the Validity and Enforceability of the Rayonier-Jackson Contract.

Appellant has contended Polson is estopped by reason of his silence to deny the validity and enforceability of the Rayonier-Jackson contract. The specific finding of the court is pertinent:

"4. Polson was not aware of the existence of the

1. It should be noted that the trial court did allow a setoff in the amount of the funds in the escrow. And under a stipulation between the parties subsequent thereto, the funds were released to Polson, without prejudice to the positions of the parties herein. The Court noted that if the funds had been dissipated, he would have allowed a full recovery to Polson, inasmuch as Rayonier had no justifiable basis for paying the funds to Jackson's estate. However, since the funds had been preserved, the Court did allow appellant an offset to the extent thereof.

> logging contract until the spring of 1961, and he did not have full knowledge of all material facts regarding the contract until July of 1961. Rayonier has not established that Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances, or that Polson's conduct misled or prejudiced Rayonier. Accordingly, Rayonier has failed to establish either its affirmative defense of Ratification or that of Estoppel." (R. 335)

The finding of the court that Polson did not have full knowledge until July of 1961 is important. Until Polson acquired such knowledge the duty to speak, if any, would not arise. Before estoppel can be asserted against Polson, it has to be established that he had actual knowledge of all material facts. As stated in *Consolidated Freight Lines Inc., v. Groenen*, 10 Wn.2d 672, 677, 117 P.2d 966, at page 968 (1941):

> "Estoppel by silence does not arise without full knowledge of the facts, and a duty to speak on the part of the person against whom it is claimed."

The Washington Supreme Court concisely stated the limitations of this type of estoppel in *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 34, 159 Pac. 1077, at page 1080 (1916):

> "Full knowledge of the facts is essential to create an estoppel by silence or acquiescence. . . . Mere silence, without positive acts, to effect an estoppel must have operated as a fraud, *must have been intended to mislead, and itself must have actually misled.* The party keeping silent must have known or had reasonable grounds for believing that the other party would rely and act upon his silence. *The burden of showing these things rests upon the party invoking the estoppel.*" (Emphasis supplied)

The court clearly held the appellant did not sustain its

burden of proof in this area. The facts actually preponderate against appellant's contentions. There are three basic areas to consider.

1. The party to be estopped must have full knowledge of all material facts.

As found by the court, Polson did not obtain full knowledge of the material facts until July of 1961. Thereafter, he would have a reasonable time in which to act. Therefore, the developments thereafter are the pertinent ones for consideration and these will be discussed below.

2. The silence must have been intended to mislead.

There is absolutely no evidence to establish any such intention on the part of Polson. Specifically, the court found the appellant Rayonier had not established that Polson's failure to inform appellant that Jackson had no authority to enter into the contract was unreasonable under the circumstances.

Until the entry of the Order in the Probate Court on July 12, 1961 confirming the Joint Venture status of certain properties (Ex. A-19-G), the right and title of Polson was being challenged and contested by certain of the heirs of Jackson. Thereafter, the work of investigating and marshalling assets continued. Throughout, Polson felt the prior notice to Rayonier (Ex. 6) was sufficient and he relied on the advice of his attorneys. (For citations to the record see Item (27) to specification of error 1.2.2 in the Appendix hereto.)

3. The silence must have actually misled and prejudiced appellant.

Here the evidence clearly preponderates against appellant. Substantially all of the logging was completed

prior to July 1, 1961. (R. 140) The roads were already constructed. The wrongful act had already been committed and for all practical purposes completed. Even if Polson had notified appellant Rayonier immediately after the entry of the order in the probate court on July 12, 1966, confirming the Joint Venture status of the property, there would have been no change in the expenses incurred by appellant and virtually no difference in the damages recoverable by Polson.

Also, it is important to note appellant made payments to Anna Jackson, as Executrix of the Estate of Jackson. Appellant knew the 1951 Joint Venture Agreement provided for payment to be made to Polson. Further, in the *usual* course of business, payments would be made to a surviving partner, not to the administrator of the Estate of the deceased partner.

This action is inconsistent with their assertion that, because Polson did not object or protest, appellant relied on the Rayonier-Jackson contract being a valid, binding contract against the Joint Venture of Polson and Jackson. If, in fact, Rayonier had done so, they would have contacted Polson and made the payments to him. Instead they continued to carefully avoid any contact with Polson. The following statement by the court is pertinent:

> "It seems indisputably clear to me that Rayonier had absolutely no right to make these payments other than to Polson; that Rayonier not only had constructive or implied knowledge thereof, but that responsible officers of Rayonier actually knew, or in the exercise of even the slightest degree of concern for the rights of others should have known, that those payments under the relationship between Jackson and Polson were to be made to or at the direction

of Polson . . ." (R. 353-354)

Clearly Rayonier was not misled or prejudiced. Not only did appellant fail to sustain the burden of proof on the affirmative defense of estoppel, the evidence clearly preponderated to the contrary.

PART IV

Rayonier Is Within the Scope of the Treble Damage Trespass Statute, or, in the Alternative, the Treble Damage Waste Statute.

The appellant's primary argument in this area is that by reason of the Rayonier-Bumgarner contracts, Rayonier became a licensee of cotenant Bumgarner and as such cannot be guilty of trespass within the scope of the applicable statute. (R.C.W. 64.12.030) The argument is without merit both as a practical and legal matter. The unambiguous language of the statute clearly encompasses the wilful and tortious actions of the appellant.

Succinctly stated, there are three essential elements in the statute (R.C.W. 64.12.030):

1. "Whenever any person shall cut down . . . or carry off any tree, timber . . ."

Appellant has admitted doing so to the extent of 3,230,-360 board feet. (R. 140)

2. ". . . on the land of another . . ."

Appellant was not on its own land. The Bumgarner Allotments were and are owned jointly by Nina Bumgarner and Polson. Also, there is a distinction between land and timber. Any interest appellant may have acquired would have been in the timber not in the land. Further,

paragraph 6 of the regulations which are attached to and are a part of the underlying Crane Creek contract (Ex. 4) provides that title to the timber would not pass until paid for by the purchaser. Appellant did not acquire any title to the timber, under the contracts appellant claims are valid, until payment was made and this was after the trees were severed and removed from the allotments and after the unlawful entry and removal was committed.

3. " . . . without lawful authority . . ."

This is the primary requirement of the statute. Instead of restricting the statute to a particular form of action, the Legislature used the more encompassing but basic requirement of ". . . without lawful authority . . ."

The actions of appellant in entering onto the land and cutting and removing the timber were "without lawful authority" for the following reasons:

A. Polson, owner of an undivided interest in the land and timber, did not at any time consent in any manner to the cutting or to the entry upon the land. (Tr. 27) His consent was necessary before there could be a lawful entry or cutting.

B. Even if appellant was a "licensee" of Bumgarner, the cutting was still without lawful authority. If the cotenant Bumgarner had personally cut the timber without Polson's consent, she would have been guilty of waste. She could not authorize another to do an act which she herself could not lawfully do.

C. The Bumgarner-Rayonier contracts, or the performance thereof, were necessarily conditional upon the appellant obtaining the consent of the remaining cotenant

Polson for the appellant's entry upon the land and cutting of timber. This consent was never obtained, even though the appellant has admitted it was at all times fully aware of this requirement. (Tr. 209-212)

The above points will be discussed in order.

A. *Polson Did Not Consent to the Cutting of the Timber.*

Appellant Rayonier cut the timber without lawful authority. Polson, owner of an undivided interest in the land and timber, did not at any time consent to the cutting or to the appellant entering upon the land. His consent was necessary before there could be a lawful entry or cutting. The evidence so clearly established that Polson's consent was not obtained, and the Rayonier-Jackson contract was unauthorized, it need not be considered further at this point. The issue on this point involves questions of Jackson's "inherent authority," if any, and this issue has been considered separately herein.

B. *Even If Appellant Rayonier Was a Licensee, It Did Not Acquire "Lawful Authority" to Cut the Timber.*

1. A grantee-licensee cannot acquire greater rights than his grantor-licensor.

A grantee-licensee (Rayonier) cannot acquire any greater rights than its grantor-licensor (Bumgarner). As will be shown herein, Bumgarner could not lawfully cut without Polson's consent, and accordingly could not license appellant to cut without Polson's consent.

The appellant has cited and relied heavily upon two

cases,[1] wherein the court held the cotenant or his licensee was not liable under a treble damage trespass statute. Each is clearly distinguishable. The *Fitzhugh* case involved the acts of the cotenant himself and the narrow question before the court was whether the acts of a cotenant would constitute "trespass." The court concluded there was no trespass by a cotenant upon common property.[2] The *Buchanan* case involved a licensee of a cotenant and more closely parallels the situation here. However, this was in a jurisdiction where a cotenant apparently does have the right to unilaterally cut the timber, and, therefore, it would logically follow, could lawfully authorize a third party to cut. The critical factor in the *Buchanan* case was the determination that the cotenant had the right to cut trees on the common property. The court treated standing timber as part of the revenue and income of the common property and not part of the corpus or realty.[3] It then reasoned the cotenant had a right to avail himself of such revenue and income. If the court had determined that the cotenant did not have such a right, then the licensee would have been guilty of trespass.

2. A cotenant commits waste when he cuts timber from the common property without the consent of the other cotenant.

There are numerous cases which hold a cotenant cannot cut timber on the common property, without the con-

1. *Buchanan v. Jencks*, 38 R.I. 493, 96 Atl. 307 (1916); *Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8 (1922).

2. The case did not discuss waste and does not disclose whether Arkansas had a statute covering actions by the cotenant.

3. The importance of the treatment of standing timber as personalty rather than realty is discussed subsequently herein.

sent of the other cotenants. If he does so, he is guilty of waste.[1] The case of *Provident Life & T. Co. v. Wood*, 96 W.Va. 516, 123 S.E. 276 (1924) is a prominent case cited for the general rule that:

> A cotenant has no right, without the consent of the other co-owner to cut and remove the timber growing upon a large area owned in common; to do so is waste for which he is responsible; nor may he confer that right upon another.

Obviously, this rule is of paramount importance where the only use of the land is the growing of trees.

In its simplest form, the basic question is: Does a cotenant (tenant in common) in the State of Washington have the right to enter onto the common property and cut and remove the standing timber without the consent of the other cotenants? We submit he clearly does not have such right. Although a cotenant in fee simple might not be subject to the treble damage waste statute, the actions would still constitute waste, and would be unlawful.

In many jurisdictions, the remedy for the commission of waste by a cotenant is accounting (or in effect single damages) instead of treble damages. However, the fact remains the conduct was wrongful, i.e., unlawful. See *Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8 at page 9 (1922), wherein the court said:

> "On land owned by several persons as tenants in common, neither of the owners is a trespasser. There

1. For a few of the cases so holding see: *Nevels v. Kentucky Lumber Co.* (Ky.), 56 S.W. 969 (1900). *Guest v. Guest* (Ala.), 176 So. 289 (1937). *Benedict v. Torrent* (Mich.), 47 N.W. 129 (1890). *Layne v. Layne*, 177 Ky. 592, 197 S.W. 1062 (1917). *Shepard v. Pettit*, 30 Minn. 119, 14 N.W. 511 (1883). *Clark v. Whitfield* (Ala.), 105 So. 200 (1925).

> is, of course, a remedy in the laws for any wrongful act committed by either of the tenants against the rights and interests of the others. Where one of the owners wrongfully commits waste by cutting the timber, or otherwise, the other owners have a remedy for the actual damages; or where the removed timber is converted into finished product and sold, there may be a recovery for the value of such finished product, less the cost of manufacture."

In this connection, the following quotes from FALK, TIMBER AND FOREST PRODUCTS LAW, page 99, are pertinent:

> "A number of respectable authorities on timber law refer to the right of a co-owner to remove his share of the timber. Two early California cases are usually cited as authority for that conclusion. However, the two California cases are most informal on that point, and should not be seriously considered. It should be obvious that a person owning 40 per cent of certain timber, whether the land is included or not, cannot fairly remove his 40 per cent. Particularly considering the quality factor involved in timber, it would be impossible to determine when 40 per cent or any other percentage had been removed. Moreover the rights of co-owners are existent in each tree, *and no one has a right to make his own segregation or partition.*
>
> "It is considered wrongful for a co-owner to harvest and sell the timber, regardless of whether that is called waste or not . . ."

The Washington court in *Crodle v. Dodge,* 99 Wash. 121, 168 Pac. 986 (1917), held the removal of timber by a cotenant constituted waste. The remedy allowed was an accounting and there was no mention of treble damages. However, it appears from the briefs filed that there was no prayer for treble damages. In any event, the court clearly held the cutting by one co-owner without the consent of the other co-owner was unlawful, i.e., waste.

And as previously stated, it follows that a co-owner cannot properly authorize a third person to do something he himself cannot lawfully do.

Although many of the cases and authorities cited to the court would appear to be in conflict, there is one basic factor which provides a basis of differentiating. In the cases where the court held the cutting of timber by the licensee did not constitute trespass, or the cutting of timber by the cotenant did not constitute waste, the standing timber was treated as personalty, as part of the revenue or income of the property. For example, the *Buchanan* case, *supra,* the *Kirby Lumber Co.* case and *Freeman on Cotenancy and Partition,* Sec. 253 (Cited on pages 74-76 of appellant's brief) are based on the premise that timber is personalty which the cotenant is entitled to use and enjoy as part of the revenue or income of the property. In the cases holding to the contrary, the court has regarded standing timber as part of the corpus, as realty, of which one cotenant cannot deprive the other cotenant, without his consent.

Under Washington law, standing timber is realty. See *Dowgialla v. Knevage,* 48 Wn.2d 326, 294 P.2d 393 (1956), and cases cited therein as establishing this principle. Accordingly, the Washington court treats the cutting of timber by one cotenant, without the consent of the other, as waste. See *Crodle v. Dodge, supra.* The cotenant cannot lawfully authorize a licensee to do any act which the cotenant could not lawfully do. Under the facts of this case, the "licensee" (appellant) has under the R.C.W. 64.12.030 cut and removed timber from the land of another without lawful authority and its acts do fall within the scope of the statute.

3. One cotenant cannot grant an easement or right-of-way without the consent of the other cotenant.

In addition to the question of authority of a cotenant to sell the timber located on common property or to contract for its cutting, there is the problem of Bumgarner granting an easment or right-of-way to Rayonier to enter onto the land for the purpose of cutting the timber. The following language is contained in the Powers of Attorney (Exs. 7 and 8) executed by the cotenant Nina Bumgarner:

> ". . . I do also hereby agree to grant any contractor holding any contract hereunder and in conformity herewith, reasonable right of way over the above described, or any other lands in which I hold any interest. . . ."

The rule is well established that one cotenant cannot, as against the other cotenants, convey an easement or right-of-way over the common property. While the cotenant could perhaps sell her undivided interest in the timber, she could not, without the consent of the other cotenant, create a right-of-way to enter on the land to cut the timber. Sec. 20 AM. JUR 2nd *Cotenancy,* Sec. 103.

Accordingly, Bumgarner could not validly create an easement or right-of-way in favor of appellant to enter onto the property. The entry itself was a trespass.

4. The legal result advanced by appellant would allow a cotenant to use an unreasonable form of self-help.

The appellant's approach would allow a cotenant to use a form of self-help, despite the availability of the judicial processes of partitionment. This would place the legal relationships between cotenants of timberlands in the State of Washington in chaos. For example, Polson is

the owner of an undivided 1-576th interest in an allotment of timberlands in the same general area as the property involved in this lawsuit. If the legal theory advanced by appellant is valid, then it would follow Polson could proceed to contract with and have someone cut all the timber on the allotment without the consent of the owner, or owners, of the other undivided 575/576ths interest. The only restriction would be that the purchaser agreed to pay a proportionate share of the purchase price to such other owner or owners. This in effect would amount to a right on the part of one co-owner to force a sale upon the other co-owner. One of the basic purposes of the treble damage trespass statute is to prevent just such a result. As stated by the court in *Guay v. Washington Natural Gas Co.*, 62 Wn.2d 473, 476, 383 P.2d 296 at page 298-299 (1963):

> ". . . in stating the purpose of the statute as two fold, to punish a voluntary offender and also to provide, by trebling the actual present damages, a rough measure for future damages, as was done in *Harold v. Toomey*, 92 Wash. 297, 158 Pac. 986, we are aware of the statute's third and additional purpose: To discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred. *One ought not to be able to create a profitable buyer-seller relationship wilfully or carelessly, where the seller is neither consulted nor willing.*"

Further, the "self-help" result advanced by appellant is totally unnecessary. A co-owner can have the property partitioned by legal process and then sell his portion free and clear, leaving the portion allotted to the other co-owner unaffected. This demonstrates the inherent

weakness of appellant's arguments. Where, as here, a party wilfully proceeds without the consent of the remaining co-owners, or without following the legal process of obtaining judicial partition if the consent cannot be obtained, then treble damages should be, and were, properly imposed.

C. *The Bumgarner-Rayonier Contracts, or the Performance Thereof, Were Necessarily Conditional Upon Appellant Obtaining Polson's Consent.*

Appellant has relied heavily upon its position as a "licensee" by virtue of the Bumgarner-Rayonier contracts. However, under the facts, appellant did not become a "licensee" by reason of said contracts. These contracts with the Indian Service on behalf of Nina Bumgarner, the owner of an undivided one-half interest, or the performance thereof, were contingent or conditional upon obtaining the consent or participation of the owners of the other undivided one-half interest in the Bumgarner Allotments, and the execution by said owners of a similar timber cutting contract. Appellant Rayonier was fully aware of the necessity of obtaining such consent or participation before it could properly and lawfully proceed. This was clearly established by the following evidence introduced through cross-examination of appellant's own witnesses, Mr. Libby of the Indian Service and Mr. Vincent, head of appellant's land department.

> "Q. Mr. Libby, did you or the Indian Service contemplate or intend that Rayonier could log the Bumgarner Allotments without actually obtaining a contract with or the consent of the owner of the unrestricted undivided interest in the Bumgarner Allotments?

"A. No." (Tr. 409, l. 25 through 410, l. 5)

(Mr. Libby):

"Q. Did you advise Rayonier that it would be up to them to enter into a contract with the owner of the unrestricted portion?

"A. Yes." (Tr. 404, ll. 11-14)

(Mr. Vincent):

"Various methods had been considered, and including the sale you mentioned, or the proposed sale, and finally appeared that the most practical way would be by including it under the terms of the contract, and he [Mr. Libby] asked me if Rayonier would be willing to accept it—these allotments under the terms of the contract with respect to the restricted half interest.

"Q. And what did you advise Mr. Libby at that time?

"A. I told him that we would certainly be willing, but that it would be useless gesture as far as any relief to Mrs. Bumgarner was concerned, unless the unrestricted half interests were likewise willing to have the allotments logged.

"Q. And the unrestricted half interest would be the Polson-Jackson interest?

"A. Yes." (Tr. 209, l. 13 through 210, l. 3)

(Mr. Vincent):

"A. I don't think that I testified that we would refuse to accept them under the contract. I indicated that it would be not a practical thing as far as Mrs. Bumgarner is concerned to expect to receive any income from this property unless the alienated interest was likewise willing to be included under the contract.

"Q. (By Mr. Howard) Was it your position, then, that you would not be in a position to log the allotment until an agreement was reached with the unrestricted interest?

"A. Yes." (Tr. 212, ll. 12-23)

It is evident appellant knew it could not lawfully proceed to log without first obtaining the valid consent of the Polson-Jackson Joint Venture. The Rayonier-Bumgarner contracts did not give appellant any "license" to proceed without such consent. This is the reason for the court's addition to "Not to be contested fact No. 8." The Indian Service was not in a position to authorize Rayonier to proceed without first obtaining the requisite consent. The true issue is the effect of the Rayonier-Jackson contract. Appellant has contended Jackson had the authority, either apparent or inherent, to commit the unrestricted ownership. The trial court, after carefully reviewing the evidence, found to the contrary. The argument on this issue has already been stated herein.

PART V

Rayonier's Conduct Was Not Such as to Give Rise to Statutory Mitigation of Damages

Appellant has asserted only single damages should have been allowed on the ground R.C.W. 64.12.040 is applicable. This statute sets forth what will be regarded as mitigating circumstances and provides only single damages will be recovered where the trespass was casual or involuntary or in a good faith, but mistaken, belief of a right to cut.[1]

1. R.C.W. 64.12.040: "If upon trial of such action it shall appear that the *trespass was casual or involuntary or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done,* or that such tree or timber was taken from unenclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages." (Emphasis supplied)

The trial court after having reviewed all the evidence made the following statements in its oral opinions.

> "After full consideration of the evidence and the briefs and the authorities, I am satisfied that a preponderance of the evidence shows that all of the elements to establish a right of recovery by plaintiff for treble damages under R.C.W. 64.12.020 and/or in the alternative treble damages for cutting timber on the lands of another person without authority under R.C.W. 64.12.030, have been fully established, and judgment should be for plaintiff unless precluded by one or more of the defendant's affirmative defenses." (R. 340-1)

> "Any extended dissertation on the several facets of the question would take an extended statement. Viewing the situation as a whole, considering that recovery is for a *wrongdoing*, which the court has found and is fully satisfied *was totally unjustified on the part of Rayonier. . . .*" (Emphasis supplied) (R. 353)

In this instance, the trial court is the finder of fact, and the above finding, which eliminates the availability of R.C.W. 64.12.040 to appellant, should not be disturbed unless clearly erroneous. Appellant has certainly not established it is "clearly erroneous." The burden is on the appellant to show that its acts were excusable, and the appellant failed to do so.

There are several Washington cases which have upheld the treble damages where the defendant was wilfully negligent, or intentionally proceeded where there was some question as to the right to do so. See *Heybrook v. Index Lumber Co.*, 49 Wash. 378, 95 Pac. 324 (1908); *Nethery v. Nelson*, 51 Wash. 624, 99 Pac. 879 (1909); *Northern Pacific Railway Company v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453 (1909); *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948).

At a minimum, appellant was grossly negligent in proceeding as it did in spite of the warning by Polson in the June 1, 1954 letter and the other facts known to appellant without contacting Polson to obtain his consent.

PART VI

Polson Recovery Is Not Limited by Reason of Any Interest of Jackson in the Joint Venture.

Appellant has argued the recovery should be limited by reason of Jackson's "interest" in the Joint Venture. However, there are several basic factual premises used by the appellant which are erroneous.

Contrary to the argument of the appellant, neither Jackson nor Jackson's estate had any real claim to any proceeds from this particular investment. The "profit," if any, was not to be determined parcel by parcel. This was made clear by paragraph 4 of the 1957 Joint Venture Agreement. (Ex. 2) Jackson would not have had any claim to any proceeds until Polson was fully reimbursed for all advances and expenses, and, in light of the large embezzlement by Jackson, this will never occur.

The court recognized the above construction of the agreement when, in the oral opinion, it stated with respect to this issue:

> ". . . the terms of the joint venture agreement and the addenda thereto, and the practices of the parties make it very clear all Jackson was to have out of the joint venture business was a share in whatever profits might result from it. It was also made emphatically clear that Polson was to be fully reimbursed for funds expended by him before any consideration to be given to a distribution of profits to Jackson. I am

> satisfied on the whole issue that the recovery should be for the full amount of the single damages in the amount stipulated, and that will be the ruling of the court." (R. 353)

It became abundantly clear after Jackson's death, that in light of the extensive amount of money he had embezzled, Polson never would be fully reimbursed and at no time will there be any "profits." This was established by the following statement by John H. Kirkwood, attorney for Anna Jackson, Executrix, in the Petition for Authorization to Enter into Settlement in the Jackson Estate, (Ex. A-19-B), which statement was verified.

> "In the opinion of counsel and the executrix, the ultimate result of said action, even after giving consideration to reductions in amounts, would be a judgment far in excess of the present assets of the estate, including the value of any possible and/or potential interests in the assets of the joint venture."

Jackson embezzled or misappropriated over $250,000 from the Joint Venture. (See page 6 of Ex. A-19-D) Actually, until the amount of $550,287.07 representing reimbursable expenditures were recovered by way of proceeds, Jackson would not have participated in any proceeds. In the accounting filed in the Estate of Jackson, an appraised value was placed on the properties. Using the appraised value as a sale figure, Polson would still have been entitled to reimbursement in the amount of $319,774.20. The losses will never be recovered or "reimbursed." Therefore, appellant has incorrectly tried to treat one-half of the recovery herein as belonging to Jackson as profit.

PART VII

Plaintiff Is Entitled to Interest on the Compensatory Portion of the Damages

Basically, appellant has argued interest is not allowable on the single damages because the amount is unliquidated and punitive damages are involved here.

While the general rule is that interest is not allowable on unliquidated damages, the trend has been to treat the damages in trespass or conversion cases as liquidated.[1] As stated by the Washington Supreme Court in *Grays Harbor County v. Bay, etc.*, 47 Wn.2d 879, 891, 289 P.2d 975 (1955) at page 982:

> "As stated in 36 A.L.R.2d 337, at pp. 348, 349, the general rule in actions of trover and conversion is that interest is allowed from the date of conversion. Considering the fact that the plaintiff has been deprived of the use of his property or its proceeds, the rule seems to us to be a salutory one."

The above case, although a conversion action, involved the cutting of timber and the court *rejected* the argument that interest was not allowable since the amount was unliquidated. The court therein cited several Washington cases where the value had been established by opinion evidence and in each instance interest was allowed from the date of taking or conversion. See: *McSor-*

1. The Trial Court recognized this trend when it stated:

   "My opinion is that the trend towards allowing interest on recovery for the conversion or misappropriation of personal property, even though it have no then fixed or determined value when it can be determined upon expert opinion testimony, and the like, is so strong and nationwide there is no doubt in my mind that when precisely and squarely presented to the Washington Supreme Court, it will follow this trend whether or not in the past it has indicated such a ruling." (R. 349)

ley v. Bullock, 62 Wash. 140, 113 Pac. 279 (1911), *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364 (1913), *Wylde v. Schoening*, 96 Wash. 86, 164 Pac. 752 (1917), *Smith Co. v. Hardin*, 133 Wash. 194, 233 Pac. 628 (1925), *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 116 P.2d 315 (1941). The same rule applies with respect to tresspass or waste situations. Specifically, with respect to tresspass, the following statement is made in 36 A.L.R.2d 337, at page 397:

> "It appears to be well settled that in actions of trespass for injury to or destruction of real or personal property, interest may be allowed as part of the damages."

The cases cited in the above annotation indicate this rule has been adopted in 27 jurisdictions, with only three to the contrary. The *Grays Harbor County v. Bay* case, *supra*, is the closest Washington case we have located.

With respect to the question of interest where treble damages are involved, the appellant has stressed too greatly the penalty aspect. The fact that a "penalty" is involved does not mean the basic principles of damages are changed. To compensate the plaintiff for the loss of his property by reason of the appellant's wrongful act he should receive the value of the property plus interest to cover the intervening time.

The special statutory aspect is separate. Only two-thirds of the recovery awarded is because of the statutory provisions. The court did not allow interest on this portion, but restricted the interest to the single damage portion.

The treble damage trespass statute R.C.W. 64.12.030 provides in pertinent part:

> ". . . if judgment be given for the plaintiff, it shall be given for treble the amount of the damages claimed or assessed therefore, as the case may be."

Appellee advanced the argument that under the statute single damages, including interest, should be trebled. The trial court rejected this argument since it, *in effect*, would allow interest on the punitive portion of the award. Therefore, the court only allowed interest on the compensatory single damages.

Appellant has cited the dicta in the Washington case of *Blake v. Grant*, 65 Wn.2d 410, 411, 397 P.2d 843, 844 (1964) as indicating that interest should not be allowed. To the contrary, the court therein has in the following statement, which is the dictum referred to by appellant, apparently approved the method used by the trial court herein of delineating between the compensatory and the punitive damages:

> "In the instant case, the trial court allowed interest from the date of conversion *upon the punitive two-thirds portion of the award as well as the compensatory one-third part.* It is recognized that the *Grays Harbor* case, *supra*, was not an action for treble damages; that our statutory action for treble damages is in the nature of a penalty . . .; and that interest is generally disallowed on *punitive damages.* 15 Am. Jur. Damages, Sec. 299, p. 742. However, since counsel for the appellants has not presented this point, and the amount involved is very small, we do not decide the question." (Emphasis supplied)

The interest allowed herein was only on the compensatory one-third of the award.

Appellant has cited *McCloskey v. Ryder*, 138 Pa. 383, 21 Alt. 148 (1891) to advance for two propositions: (1) No interest is allowable on punitive damages; and (2) the

statutory recovery is limited to treble the value of the trees, whereas the common law remedy allows single damages plus interest. On the first point we again state the trial court allowed interest *only* on the compensatory one-third portion. Interest was not allowed on the punitive damages. On the second point, the Pennsylvania court in the above case was merely restating the words of the particular statute involved. The Pennsylvania statute specifically provided that the recovery would be for three times the value of the timber cut and converted and double the value of the timber cut down and left on the ground. The Washington Statute does not so limit the recovery.

PART VIII

The Trial Court Entered Adequate Finding of Fact and Conclusions of Law.

It is important to note what has been entered in the way of findings and conclusions. The 54 Admitted Facts (R. 133-140) were incorporated by reference. The 10 Facts Not to Be Contested (R. 141-142) were incorporated by reference with a specific finding added to Fact Not to Be Contested No. 8 (R. 335). In addition, the court made two important findings (R. 335) and then incorporated by reference his four oral opinions wherein the issues were thoroughly discussed. The use of memorandum opinions to set forth Findings and Conclusions is entirely proper. The oral opinions (R. 337-367) are extensive.

The appellant would have the court enter findings on a mass of details. Further, a large segment would deal with appellant's affirmative defenses, which the court held

were not established by a preponderance of the evidence. This failure of proof, of necessity, creates a negative situation wherein it is extremely difficult to enter other than "ultimate" type findings.

The statement by the court in connection with appellant's request for additional findings was correct:

> "All others of the additional findings seem to me to fall into either of two classes; one, a matter that I have made all the findings that this case requires, or, secondly, relates not to ultimate facts or even essential facts but to details sufficiently covered by the findings I have previously made." (R. 358)

The following statement by the court on this subject was also sound:

> "After considerable examination of the proposed findings offered by both plaintiff and defendant, tentatively, at least, I believe under the civil rule pertaining to the making an entry of Findings of Fact and Conclusions of Law in support of judgment, the admitted facts in the pretrial order and what I have now stated of record, on this occasion and previously, covers all of the essential and ultimate facts necessary to be found and specifically included in formal findings keeping in mind that findings as to minutia are not contemplated by the rule." (R. 344)

The court did give the parties an opportunity to request additional specific findings. Appellant did so by motion. The discussion between counsel and the court on this point is pertinent. (See R. 361-366)

Taking into account the whole of the 54 Admitted Facts, the 10 Facts Not to Be Contested, the additional specific findings of the court, and the four oral opinions of the court, the Findings and Conclusions contained therein are more than adequate.

CONCLUSION

Appellant has stated this is a strange case. However, the strangeness arises from the conduct of Appellant Rayonier. Despite the specific warning from Polson as to the limitations or restrictions on Jackson's authority, and despite Rayonier's knowledge as to Polson's interest in the property, Appellant Rayonier proceeded to deal with Jackson and after his death to cut the timber, without once communicating with Polson. Rayonier's conduct is indeed strange and unwarranted. As stated by the District Court:

> "Viewing the situation as a whole, considering that the recovery is for a wrongdoing, which the court has found and is fully satisfied was totally unjustified on the part of Rayonier. . . ." (R. 353)

Appellant tried to overcome the above by means of certain affirmative defenses. However, as to each the appellant failed to sustain its burden of proof.

The judgment of the District Court should be affirmed.

Respectfully submitted,

RYAN, ASKREN, CARLSON, BUSH & SWANSON
RICHARD J. HOWARD
RICHARD K. BUSH
Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD J. HOWARD
RICHARD K. BUSH
Of Counsel for Appellee

APPENDIX

Citations in Support of Findings and Conclusion Challenged by Appellant.

Specification 1.1. F. & C. No. 4 (R. 335)

> "4. Polson was not aware of the existence of the logging contract until the spring of 1961, and he did not have full knowledge of all material facts regarding the contract until July of 1961. Rayonier has not established that Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances, or that Polson's conduct misled or prejudiced Rayonier. Accordingly, Rayonier has failed to establish either its affirmative defense of Ratification or that of Estoppel."

The following admitted facts and testimony support the above finding with respect to when Polson acquired certain knowledge.

Admitted Facts:

48 (R. 140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
159	24		160	21
163	17		165	1
178	21		178	25
494	19		495	1
497	11		497	22
499	22		500	1
515	3		515	24
549	18		550	23
620	11		621	3

The following exhibits, admitted facts and testimony support the above finding with respect to the fact that Polson's failure to notify Rayonier was not unreasonable

in the circumstances and did not mislead or prejudice Rayonier.

Exhibits:

6 Registered letter from Polson to Rayonier dated June 1, 1954.

29 Letter dated November 15, 1960 from Len Forrest to Anna Jackson.

A-19-F Executrix Deed

A-19-G Order Confirming Joint Venture Status of Certain Properties

A-19-L Petition for Order Confirming Joint Venture Status of Certain Assets

A-20-A Escrow Agreement

Admitted Facts:

1, 48, 49, 51 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
26	3		27	19
159	24		167	23
174	23		180	20
206	21		208	5
218	8		220	24
280	7		280	20
285	5		285	7
294	10		296	14
298	8		299	25
510	13		511	4
515	3		515	23
521	17		523	2
536	10		538	13
557	19		558	17
572	22		574	20
583	3		583	11

Specification 1.2.1. F. & C. No. 5, Ex. B (R. 340-1)

> "After full consideration of the evidence and the briefs and authorities, I am satisfied that a preponderance of the evidence shows that all of the elements essential to establish a right of recovery by plaintiff for treble damages under R.C.W. 64.12.020 and/or in the alternative treble damages for cutting timber on the lands of another person without authority under R.C.W. 64.12.030, have been fully established, and judgment should be for plaintiff unless precluded by one or more of the defendant's affirmative defenses."

To facilitate consideration of particular portions of the evidence in support of the above finding, a series of conclusions are set forth below and pertinent exhibits, admitted facts and portions of the testimony are cited in support of each. The following are not all of the factors involved in the above finding, but are those particularly directed at the reasons stated by the appellant in contending the above finding is in error:

(1) The logging operations on the Bumgarner Allotments, and the removal of timber therefrom, were not done by Rayonier in good faith and Rayonier did not have probable cause to believe that in doing so it was acting under full and proper claim of right.

Exhibits:

1 1951 Joint Venture Agreement

2 1957 Joint Venture Agreement

3 Declaration of Trust

5 Letter Agreement dated April 19, 1954

6 Registered Letter from Polson to Rayonier dated June 1, 1954

15 Rayonier-Jackson Contract

27 Map

33 Vouchers for payments by Rayonier to Jackson

Admitted Facts:

1, 15, 16, 23, 28, 29, 30, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 48, 50 and 51 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
189	14		191	20
195	18		195	22
197	20		197	23
198	1		199	3
200	19		200	25
269	11		269	20
271	8		271	13
273	5		274	6
276	20		277	6
280	7		280	20
203	13		204	18
212	13		212	25
218	7		220	25
226	18		227	13
227	24		228	18
238	7		245	23
248	8		248	25
249	25		250	25
252	20		260	21
266	15		268	18
281	8		285	19
293	8		293	14
294	10		296	24
298	8		299	6
299	6		300	25
304	10		309	7
600	9		600	17
601	6		601	9
603	11		604	22

(2) Jackson was acting outside the scope of his authority, whether apparent, actual or inherent, when he negotiated with Rayonier, Nina Bumgarner and the Bureau of Indian Affairs with respect to logging of timber on the Bumgarner Allotments, and when he executed the Addendums and the Jackson-Rayonier Contract.

Exhibits:

1 1951 Joint Venture Agreement

2 1957 Joint Venture Agreement

3 Declaration of Trust

5 Registered Letter from Polson to Rayonier dated June 1, 1954

Admitted Facts:

1, 15, 16, 28, 29, 35, 36, 37, 39, 44, 48 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
51	5		51	16
58	23		59	5
65	24		67	8
74	1		75	1
493	9		493	17
620	11		621	3

(3) The course of conduct and dealing of Polson and Jackson was not such as to give Jackson the apparent authority to contract for the cutting of timber on the Bumgarner Allotments.

In addition to the foregoing citation in (1) above, particular reference should be made to:

Page	Line	through	Page	Line
64	25		65	7
280	7		280	12
285	5		285	7
620	11		620	14

(4) Polson had no knowledge of and did not consent to Jackson's actions in negotiating for or executing the Addendums and the Rayonier-Jackson contract. Polson did not in any manner consent to the Rayonier-Jackson contract, either before or after its execution. Said contract was unauthorized.

Exhibits:

6 Registered Letter from Polson to Rayonier dated June 1, 1954

9 Addendum

10 Addendum

15 Rayonier-Jackson Contract

Admitted Fact:

48 (R. 140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
163	17		165	1
176	10		178	21
179	14		180	24
494	19		495	1
497	11		497	22
499	22		500	2
620	11		621	3

(5) The Rayonier-Bumgarner contract or the performance thereof was contingent or conditional upon obtaining the consent or participation of the owners of the other un-

divided one-half interest in the Bumgarner Allotments, and the execution by said owners of a similar timber cutting contract. Said consent or participation was not obtained. Rayonier was aware of the necessity of obtaining such consent and the fact that it was not obtained.

Exhibits:

25 Letter dated March 19, 1954
35 Affidavit of John W. Libby

Transcript:

Page	Line	through	Page	Line
209	13		210	3
212	3		212	25
404	11		404	14
409	25		410	5

Specification 1.2.2 F. & C. N.O. 5, Ex. B (R. 341)

> "Each of the several defenses has been carefully considered in the light of the facts I find shown by a preponderance of the evidence, I considered credible, and, of course, in view of the controlling authorities, in my opinion, the evidence actually preponderates against the defenses of estoppel, ratification, and apparent authority, but at a minimum I must find, because I sincerely believe it to be correct, that there is not a preponderance of the evidence to sustain any of the affirmative defenses."

To facilitate consideration of particular portions of the evidence in support of the above finding a series of conclusions are stated below and pertinent exhibits, admitted facts, and portions of testimony are cited in support of each. The following are not all of the factors involved in the above finding, but are those particularly directed at the reasons stated by appellant in assigning error to

said finding. The citations under specification of error 1.2.1 are also pertinent.

(1) Jackson was acting outside the scope of his authority, whether apparent, actual or inherent, when he negotiated with Rayonier, Nina Bumgarner and the Bureau of Indian Affairs with respect to logging of timber on the Bumgarner Allotments, and when he executed the Addendums and the Rayonier-Jackson Contract.

Exhibits:

1 1951 Joint Venture Agreement
2 1957 Joint Venture Agreement
3 Declaration of Trust
5 Registered Letter from Polson to Rayonier dated June 1, 1954

Admitted Facts:

1, 15, 16, 28, 29, 35, 36, 37, 39, 44, 48 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
51	5		51	16
58	23		59	5
65	24		67	8
74	1		75	1
493	9		493	17
620	11		621	3

(2) The 1951 Joint Venture Agreement provided that sales could be made as agreed upon by the parties, and all proceeds thereof were to be paid to Polson. Rayonier had obtained a copy of this agreement and knew its terms prior to and at the time of the execution of the Rayonier-

Jackson contract. In addition the 1951 Joint Venture Agreement was filed for public record on June 4, 1953 in the Grays Harbor County Auditor's office.

Exhibits:

1 1951 Joint Venture Agreement

30 Notes from Rayonier files relating to 1951 Joint Venture Agreement

Admitted Facts:

29, 35 (R. 136-137)

Transcript:

Page	Line	through	Page	Line
219	9		219	21
227	18		228	8
256	7		256	20
257	17		257	21
258	2		260	21
267	22		268	8
617	25		618	2

(3) Cleveland Jackson and Anna A. Jackson, his wife, acknowledged in writing that he held title to the undivided one-half interest in the Bumgarner Allotments, as trustee only, for the Polson-Jackson Joint Venture under the terms of the 1951 Joint Venture Agreement, and that he was without power to sell, exchange, convey, mortgage or otherwise encumber or contract in respect thereto except with the express consent of Polson.

Exhibits:

1 1951 Joint Venture Agreement

3 Declaration of Trust

Admitted Facts:

15, 16 (R. 135)

(4) Rayonier knew or should have known of the existence and terms of the Declaration (Item No. (3) above). Said Declaration was filed for public record on May 5, 1954 in the Grays Harbor County Auditor's office.

Exhibit:

3 Declaration of Trust

Admitted Fact:

16 (R. 135)

Transcript:

Page	Line	through	Page	Line
14	20		17	9
203	17		204	2
618	3		618	5

(5) By letter dated April 19, 1954, written by Rayonier to Jackson, and signed by both parties, an Agreement was recited with respect to rights of ways over certain parcels of land, including therein the Bumgarner Allotments. The information was supplied by Jackson, and Rayonier subsequently became aware of several inaccuracies in said information. In particular, the Bumgarner Allotments are listed as full ownership instead of an undivided one-half interest and it is listed as Jackson ownership instead of Polson-Jackson Joint Venture property. Forrest participated in the preparation of this Agreement.

Exhibits:

5 Letter Agreement dated April 19, 1954

Admitted Fact:

27 (R. 136)

Transcript:

Page	Line	through	Page	Line
19	10		19	16
252	20		254	11
266	17		267	1

(6) By registered letter dated June 1, 1954, written by Polson to Rayonier, and received by Rayonier on or about June 2, 1954, notice was given to Rayonier that as to certain lands, including the Bumgarner Allotments, Jackson held title as trustee only, that Jackson did not have authority to enter into a contract such as Exhibit 15 and that the agreement referred to in Number 5 above was unauthorized, and if Rayonier wished to negotiate with respect to said land, Polson, upon being contacted, would be available to negotiate. Forrest was advised that Polson had objected to said agreement (Ex. 5) and the right of way plan would be dropped.

Exhibit:

6 Registered Letter from Polson to Rayonier dated June 1, 1954

Admitted Fact:

28 (R. 136)

Transcript:

Page	Line	through	Page	Line
22	6		24	18
254	20		254	21
306	13		309	8

(7) The 1957 Joint Venture Agreement provided that any sale, liquidation, lease, or other disposition of any interest in timber lands would be undertaken by Polson, but only with the approval of Jackson.

Exhibit:

2 1957 Joint Venture Agreement

(8) Rayonier should have known of the existence of the 1957 Joint Venture Agreement.

Exhibits:

1 1951 Joint Venture Agreement
1 1957 Joint Venture Agreement
3 Declaration of Trust
6 Registered Letter from Poulson to Rayonier dated June 1, 1954

Admitted Facts:

1, 15, 16, 28, 29, 35, 36, 37, 39 (R. 133-138)

This arises out of the duty on the part of Rayonier to inquire as to the extent of Jackson's authority.

(9) Polson had no knowledge of and did not consent to Jackson's actions in negotiating for or executing the Addendums and the Rayonier-Jackson contract.

Exhibits:

9 Addendum
10 Addendum
15 Jackson-Rayonier contract

Admitted Facts:

48 (R. 140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
163	17		165	1
494	19		495	1
497	11		497	22
499	22		500	1
620	11		621	3

(10) The course of conduct and dealings of Polson and Jackson was not such as to give Jackson the apparent authority to contract for the cutting of timber on the Bumgarner Allotments.

See annotations to Item (1) above. In particular reference is made to :

Transcript:

Page	Line	through	Page	Line
64	25		65	7
280	7		280	12
285	5		285	7
620	11		620	14

(11) Polson did not in any manner consent to the Rayonier-Jackson contract, either before or after its execution. Said contract was unauthorized.

Exhibits:

6 Registered Letter from Polson to Rayonier dated June 1, 1954

15 Rayonier-Jackson contract

Transcript:

Page	Line	through	Page	Line
27	8		27	11
176	10		178	21
179	14		180	24

(12) L. J. Forrest has been employed by Rayonier at its Hoquiam, Washington office. From approximately 1950 to 1960 Mr. Forrest was manager of the Land Department. Since April, 1960, he has been a Vice-President of Rayonier, General Manager of Timber Operations, and the Chief Executive Officer of Rayonier in the State of Washington area. Mr. Wilton Vincent has been employed by Rayonier for approximately 20 years and for the last eight years has been the manager of the Land Department.

Admitted Fact:

19 (R. 135)

Transcript:

Page	Line	through	Page	Line
188	5		188	14
221	25		222	16

(13) Rayonier and in particular Messrs. Forrest and Vincent knew or should have known that Jackson did not have authority, apparent or otherwise, to contract for the cutting of timber on the Bumgarner Allotments, and should have inquired as to the extent of his authority.

See annotations to Items (1), (2) and (10) above.

(14) Rayonier could not reasonably assume that if Polson had any objection to the Rayonier-Jackson contract he would so advise them at the time of its execution. Rayonier should have contacted Polson directly.

See annotations to Items (1), (2) and (10) above.

(15) Rayonier did not act in good faith and with probable cause if it relied on any representations of Jackson as to the extent of his authority, or upon his representations, if any, that Polson had consented to the Rayonier-Jackson contract.

See annotations to Items (1), (2) and (10) above.

In particular reference is made to Exhibit 6, admitted facts 35, 36, 37, (R. 137-138) and to the following portions of the transcript:

Page	Line	through	Page	Line
218	7		220	25
280	7		280	12
285	5		285	7
299	8		299	25
304	10		309	7

(16) Rayonier drafted the Rayonier-Jackson contract including a provision therein whereby Cleveland Jackson and Anna Jackson represented and warranted that they owned the one-half interest in the timber. Rayonier knew this was not true.

Exhibits:

15 Rayonier-Jackson contract

Admitted Facts:

36, 37, 44, 45, 46, and 47 (R. 137-139)

Transcript:

Page	Line	through	Page	Line
195	18		200	25
284	1		285	9

(17) Rayonier considered Jackson to be a valuable man to Rayonier primarily by reason of his strategic position of importance and influence in and with the Quinault Indian Tribe, and other Indians, and by reason of the benefits to be derived by appellant in having a close and favorable relationship with the individual representing the Tribe in its dealings with appellant, the United States Government, and others.

EXHIBIT:

33 Invoices covering payments by Rayonier to Cleveland Jackson.

Admitted Fact:

26 (R. 136).

Transcript:

Page	Line	through	Page	Line
229	8		229	14
238	7		246	13
249	25		251	1

(18) Rayonier, from 1950 through June of 1960, compensated Jackson, as an employee, with regular monthly payments in the approximate amount of $400 to $420 each.

Exhibit:

33 Invoices covering payments by Rayonier to Jackson.

Transcript:

See annotation to Item (17) and in particular transcript page 242, line 5 through page 243, line 6.

(19) Jackson submitted monthly statements showing a certain number of days cruising etc. Rayonier knew that in many instances these statements were not true and in many instances Jackson might not have performed any services during the month in question.

Exhibit:

33 Invoices and statements.

Transcript:

Page	Line	through	Page	Line
241	6		241	9
244	24		245	22

(20) Jackson embezzled over Two Hundred Thousand Dollars ($200,000) from Polson.

Exhibits:

A-19-C Amended Creditors Claim

A-19-D Accounting of F. Arnold Polson, Surviving Joint Adventurer

A-19-E Creditor's Claim

A-20-D Complaint

Transcript:

Page	Line	through	Page	Line
516	19		517	17
517	21		518	1
525	16		526	1

(21) Rayonier purposely did not contact Polson with

respect to logging the Bumgarner Allotments, both before and after the execution of the Rayonier-Jackson contract.

Exhibit:

29 Letter dated November 15, 1960 from Len Forrest to Anna Jackson.

Admitted Fact:

48 (R. 140).

Transcript:

Page	Line	through	Page	Line
26	23		27	19
280	7		280	20
294	10		296	14

(22). Rayonier did not, in fact, rely on any lack of protest or objection from Polson in (a) entering into the Rayonier-Jackson contract, or (b) in commencing or continuing logging operations on the Bumgarner Allotments.

See annotations to Items (1) and (20) above and in particular page 280, lines 7 through 11 and page 285, lines 5 through 7.

(23). Rayonier paid moneys to Anna Jackson, which they knew should be paid to Polson if they, in fact, regarded the Rayonier-Jackson contract a valid, binding contract with the Polson-Jackson Joint Venture.

Exhibits:

A-46 (a) through (g)

Admitted Facts:

1, 51 (R. 133, 140).

Transcript:

Page	Line	through	Page	Line
206	21		208	5
218	8		220	24
298	8		299	25

(24). Polson did not learn about the existence of the Addendums or the Jackson-Rayonier contract until sometime in the spring of 1961.

See annotations to Item (9) above.

(25). Polson did not learn about Anna Jackson receiving any payments from Rayonier for the cutting of timber on the Bumgarner Allotments until sometime after July 1, 1961.

See annotations to Item (9) above and in addition transcript page 515 lines 3 through 24.

(26). Polson did not know that Rayonier was contemplating logging the Bumgarner Allotments until sometime well after the logging operations had commenced, and Polson was not fully aware that Rayonier was actually logging the Bumgarner Allotments until sometime after the spring of 1961.

See annotations to Item (9) above and in addition transcript.

Page	Line	through	Page	Line
159	24		160	21
178	21		178	25
549	18		550	23

(27). Polson did not object or protest to Rayonier about the logging on the Bumgarner Allotments until after the cessation of logging in July of 1961 because he did

not have full knowledge of all the material facts until after that date. It was felt essential to first confirm the title in Polson and to complete the investigation of the facts, which investigations continued through the Grays Harbor County Probate Court on July 12, 1961, ordered Anna Jackson as Executrix of the Estate of Jackson, to convey and assign the legal and record title in the Bumgarner Allotments and certain other properties to Polson, by good and sufficient deed. Until such order of the court, the right and title of Polson was being challenged and contested by certain of the heirs of Jackson. Further, Polson felt the prior notice to Rayonier (Ex. 6) was sufficient, and throughout he relied on the advice of his attorneys.

Exhibits:

A-19-F Executrix Deed

A-19-G Order Confirming Joint Venture Status of Certain Properties and Directing Their Conveyance and Transfer to the Surviving Joint Venturer

A-19-L Petition for Order Confirming Joint Venture Status of Certain Assets and Authorizing Their Conveyance and Transfer to the Surviving Joint Venturer

Transcript:

Page	Line	through	Page	Line
159	24		167	23
174	23		180	20
510	13		511	4
515	3		515	23
521	17		523	2
536	10		538	13
557	19		558	17
572	22		574	20

(28). Under the facts and circumstances of this case, the delay, if any, by Polson in objecting or protesting to Rayonier or in disavowing the Rayonier-Jackson contract, was not unreasonable. Polson throughout relied upon the advice of his attorneys.

See annotations to Item (27) above.

(29). The delay, if any, by Polson after July 1, 1961, in notifying Rayonier that the Rayonier-Jackson contract was unauthorized did not prejudice Rayonier, and was not in bad faith nor intended to induce Rayonier to act to its prejudice.

Exhibit:

A-20-A Escrow Agreement

Admitted Fact:

49 (R. 140).

Transcript:

Page	Line	through	Page	Line
583	3		583	11

(30). Polson did not, at any time, intend to ratify the unauthorized acts of Jackson.

See annotations to Items (9) and (27) above.

(31). Polson did not exercise a continuing demand upon Anna Jackson, as Executrix of the Estate of Cleveland Jackson, that she pay over to him the funds paid by Rayonier to her.

Transcript:

Page	Line	through	Page	Line
517	18		517	24
564	23		566	18
580	11		584	2

(32). Polson has not exercised complete dominion over the funds that Rayonier paid to Anna Jackson, as Executrix of the Estate of Cleveland Jackson, pursuant to the Rayonier-Jackson contract. The escrow agreement with respect to said funds was made after the commencement of this lawsuit for the purpose of preserving said funds.

Exhibit:

A-20-A Escrow Agreement

Transcript:

Page	Line	through	Page	Line
517	18		517	24
564	23		566	18
580	11		584	2

Specification 1.2.3. F. & C. No. 5, Ex. B (R. 342-3)

> "There is no direct evidence in the case which I find credible, nor any inference from evidence which I consider reasonable, showing that Beaulieu any time had, was held out as having, or exercised any responsibility, authority, or agency for either Polson individually or for the Polson-Jackson joint venture concerning the sale of either land or timber owned by the joint venture. There is no evidence that he even so much as knew of a single proposed sale of joint venture land or timber other than as to the Bumgarner tract. He so testified, I believe him, and I do not consider any countervailing evidence has been offered.
>
> "In my opinion, it is a fair inference from the evidence as a whole that Beaulieu's duties and respon-

sibilities for the joint venture were largely, if not wholly, clerical and ministerial, and such as they were, his duties were primarily, if not exclusively, concerned with the acquisition of timber lands by the joint venture and not the sale of joint venture property.

"I find as a fact that such limited knowledge of the Bumgarner transaction as Beaulieu had, and in this respect I accept his statement of it and his views of what it amounted to at all times prior to the death of Jackson and for some time thereafter, indicated a tentative or proposed transaction. Beaulieu did not personally participate in that transaction, that is, in the negotiations or anything of that sort. He assumed, and under all of the circumstances I find he had a right to assume, that Jackson would not act in the matter in violation of his limited authority under the joint venture agreement which he, Beaulieu knew of from the beginning of his employment for the joint venture."

Transcript:

Page	Line	through	Page	Line
76	1		83	11
434	19		435	18
442	11		443	20
445	1		447	2
448	22		450	24
463	20		464	21
489	15		491	8
493	9		495	2
497	4		501	10
502	16		503	17

Specification 1.2.4 F. & C. No. 5, Ex. B (R. 343-4)

". . . I further find under all the circumstances that it was not his responsibility or duty to report what little he knew of the matter to Polson."

See citations under F. & C. No. 5, Ex. B (R. 343-4), Specification of Error 1.2.3.

Specification 1.2.5. F. & C. No. 5, Ex. B (R. 344)

> "From these views it is my conclusion on the facts as found that the plaintiff is entitled to recover treble damages as prayed for based on R.C.W. 64.12.020 or, in the alternative, R.C.W. 64.02.030, or both."

The record citations for this are covered under previous findings, this being a conclusion arising from the other Findings of Fact.

Specification 1.2.6. F. & C. No. 5, Ex. C (R. 349)

> "Therefore, on that phase of the matter, I consider it so clearly indicated that further expense and delay in final disposition of this case by referral of the question to the State Supreme Court is not warranted. Therefore, I will hold and find in computing single damages, interest should be allowed."

This is strictly a Conclusion of Law. No citation to the record is required.

Specification 1.2.7. F. & C. No. 5, Ex. C (R. 353)

> "Certainly the resolution of the first of these two questions: Namely, whether recovery should be allowed for the full amount of the value of the timber stipulated at $23,000, or for only one-half of that amount, is not entirely free from doubt.
>
> "Any extended dissertation on the several facets of the question would take an extended statement. Viewing the situation as a whole, considering that recovery is for a wrongdoing, which the court has found and is fully satisfied was totally unjustified on the part of Rayonier, the terms of the joint venture agreement and the addenda thereto, and the practices of the parties make it very clear all Jackson was to have out of the joint venture business was a share in whatever profits might result from it. It was also made emphatically clear that Polson was to be fully reimbursed for funds expended by

him before any consideration be given to a distribution of profits to Jackson. I am satisfied on the whole issue that the recovery should be for the full amount of the single damages in the amount stipulated, and that will be the ruling of the court."

This is primarily a legal question, however, certain exhibits and certain portions of the testimony are particularly pertinent.

Exhibits:

1 1951 Joint Venture Agreement
1 1957 Joint Venture Agreement

A-19-B Petition for Authorization to enter into Settlement

A-19-C Amended Creditors Claim

A-19-E Creditors Claim

A-19-F Executrix Deed

A-19-G Order Confirming Joint Venture Status of Certain Properties

A-19-L Petition for Order Confirming Joint Venture Status of Certain Properties

A-20-B Agreement

A-20-D Complaint

Transcript:

Page	Line	through	Page	Line
504	11		505	8
517	25		521	7
523	3		525	2
525	16		526	1

Specification 1.2.8 F. & C. No.5, Ex. D (R. 361)

"Considering the latest memoranda and the entire record, I have no doubt whatever in my mind that recovery can and should be grounded in trespass.

However, if on appellate review it should be determined that the action does not lie in trespass, I find that it should and does lie in waste. Therefore, I now hold and find that recovery be allowed for trespass, which, of course, will not include recovery of attorneys' fees; and if it be found on appellate review that recovery in trespass is not appropriate, it is found and held that recovery be allowed for waste including allowance for attorneys' fees in the amount previously specified."

This is primarily a legal conclusion. To the extent facts are involved they have been covered with citations to the record in the argument portion of the brief.

Specification 1.3 That portion of Finding of Fact and Conclusion of Law No. 2 (R. 334, 335) as follows:

"It is the finding of the court that 'Fact Not to Be Contested" No. 8 is hereby modified by the caveat stated by the plaintiff in connection therewith. It is the specific finding of this court that Mr. Libby did not have authority to authorize a contract without procuring the approval of Polson, which approval was not obtained." Together with that portion of Finding of Fact and Conclusion of Law No. 5 that is lines 5-12, p. 10, Ex. C. (R. 357).

Exhibits:

25 Letter dated March 19, 1954
35 Affidavit of John W. Libby

Transcript:

Page	Line	through	Page	Line
209	13		210	3
212	3		212	25
404	11		404	14
409	25		410	5